

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

UNITED STATES OF AMERICA,

v.

LARRY G. CHILDERS,

Defendant.

CRIMINAL ACTION NO.
2:19po401

TRANSCRIPT OF PROCEEDINGS

Norfolk, Virginia

December 4, 2019

BEFORE: THE HONORABLE ROBERT J. KRASK
United States Magistrate Judge

APPEARANCES:

UNITED STATES ATTORNEY'S OFFICE

By: Dee Sterling
Assistant United States Attorney
Counsel for the United States

STEPHENS & ROBERTS

By: J. Stephen Roberts
Counsel for the Defendant

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1 (Hearing commenced at 9:48 a.m.)

2 THE CLERK: United States of America versus Larry
3 G. Childers, case number 2:19po401.

4 Are counsel ready to proceed?

5 MS. STERLING: Your Honor, the government is ready.
6 I would advise the Court that this is going to be a trial.
7 I don't know if the daily docket is close to be completed,
8 but this could take us a little while if the Court wanted
9 to --

10 MR. ROBERTS: We are ready, Your Honor. I have the
11 forms required of my client.

12 THE COURT: Very well. I'm just wondering whether
13 we should try and get through the rest of the docket.

14 Mr. Cole, what is your assessment of how long it
15 will take to deal with -- I know we have some other guilty
16 pleas.

17 MR. COLE: Your Honor, it probably should take me
18 the 10, 15 minutes more.

19 THE COURT: Let's do that.

20 MR. ROBERTS: Yes, sir.

21 THE COURT: Let's complete the docket.

22 MR. ROBERTS: May I present these to the Court?

23 THE COURT: You may. The court security officer
24 will get them.

25 MR. ROBERTS: Thank you, Judge.

1 (Recess from 9:49 to 10:21 a.m.)

2 THE CLERK: United States of America versus Larry
3 G. Childers, case number 2:19po401.

4 Are counsel ready to proceed?

5 MR. ROBERTS: We are.

6 MS. STERLING: The Government is ready. Your
7 Honor, before we begin, I just wanted to -- I'm quite
8 certain I did this but not absolute certain, the last time
9 we were here on the initial -- on this case in the initial
10 appearance, make sure that the Court is aware that I did
11 amend the violation notice to allege the offense. It's
12 under 16 U.S.C. 704(b)(1).

13 It originally read 703. It should have been 703 et
14 seq. Migratory Bird Treaty Act but more -- 704(b)(1) is the
15 specific statutory reference.

16 THE COURT: All right. Let me get to -- or just
17 get the violation notice. So you're moving to amend the
18 charge to Title 16, United States Code Section 704(b)(1)?

19 MS. STERLING: That's correct. I thought I had
20 done that last time but that is what I do want to do.

21 THE COURT: Any objection to that, Mr. Roberts?

22 MR. ROBERTS: No, sir. We were made aware of that,
23 and we do not object. I think that accurately reflects the
24 government's allegation.

25 THE COURT: Give me just a moment to reflect the

1 revised charge. Is the remainder of the charge that refers
2 to the related Code of Federal Regulation --

3 MS. STERLING: That's correct.

4 THE COURT: -- that remains?

5 MS. STERLING: 20.21 sub-section 9, that's correct,
6 Your Honor.

7 THE COURT: Very well. All right. If you both
8 will come to the podium.

9 Good morning again. Are you, is it Childers?

10 THE DEFENDANT: Childers, yes, sir.

11 THE COURT: I'm sorry?

12 THE DEFENDANT: Childers.

13 THE COURT: Are you, in fact, Larry Childers?

14 THE DEFENDANT: Yes, I am.

15 THE COURT: Mr. Childers, you're before the Court
16 today, as you know from your prior appearance, because you
17 are charged with taking or attempting to take migratory game
18 birds by aid of baiting, or on or over baited areas where
19 you knew or reasonably should have known that the area was
20 or had been baited.

21 That's an offense in violation of Title 16, United
22 States Code Section 704(b)(1), as well as the corresponding
23 regulations implemented to carry out that particular code
24 section, which are contained at 50 Code of Federal
25 Regulations Section 20.21(i). That is an offense that is

1 a -- I believe it's a class B misdemeanor. It carries the
2 following penalties: Up to six months in jail, the fine of
3 up to \$15,000, you'd have to pay a \$10 special assessment,
4 as well as a \$30 processing fee if you pled guilty or were
5 convicted of that charge.

6 Do you understand, sir, what you're charged with?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: Do you understand the penalties, the
9 maximum penalties for that charge upon conviction?

10 THE DEFENDANT: Yes, Your Honor.

11 THE COURT: Mr. Childers, you were present when I
12 reviewed with everyone their constitutional rights here
13 today. Did you understand what I told you?

14 THE DEFENDANT: Absolutely, yes, sir.

15 THE COURT: Do you have any questions about those
16 rights?

17 THE DEFENDANT: No, sir.

18 THE COURT: And to reflect the fact that you
19 understand your rights, did you read over, understand, and
20 sign this acknowledgement of rights form I'm holding up?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: And, Mr. Roberts, did you sign this
23 form and review it with your client?

24 MR. ROBERTS: I did.

25 THE COURT: And when you did so did he appear to

1 understand it?

2 MR. ROBERTS: I believe so, yes, sir.

3 THE COURT: Very good. Secondly, I have another
4 form, Mr. Childers, that appears to be signed by you in
5 three places. It is a consent and waiver form I'm holding
6 up. I guess we don't need to go through this because it's
7 not a class A misdemeanor.

8 MS. STERLING: That's correct.

9 THE COURT: So there is no need to address the
10 consent. I was going to ball out Mr. Roberts for not
11 signing this form, but it's not necessary for this
12 particular instance.

13 MR. ROBERTS: As long as you ball me out and not
14 him, Judge, that's fine.

15 THE COURT: All right. Gentlemen, Mr. Childers, is
16 it correct that you desire to plead not guilty and to go to
17 trial on this charge?

18 THE DEFENDANT: Yes, that is correct, yes, sir.

19 THE COURT: Very well. Then if you will both be
20 seated, we will proceed with the presentation of evidence
21 unless either attorney desires to make an opening statement.

22 MS. STERLING: No opening statement is necessary.

23 MR. ROBERTS: Defense waives opening statement,
24 Your Honor.

25 THE COURT: All right. Thank you, both. Is there

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1 any request to have witnesses excused from the courtroom
2 during the taking of testimony other than the testifying
3 witness?

4 MR. ROBERTS: I would so move, if it please the
5 Court, and we have one witness, Mr. Hodge, who should be
6 excused as well.

7 THE COURT: Very well. Then who is your first
8 witness, Ms. Sterling?

9 MS. STERLING: Officer Howlett.

10 THE COURT: All right. Anyone other than that
11 officer who expects to testify should wait outside the
12 courtroom. You will be notified when it's your turn to
13 testify.

14 (Witness was sworn.)

15 ZACHARY R. HOWLETT, called by the Government,
16 having been first duly sworn, was examined and testified as
17 follows:

18 DIRECT EXAMINATION

19 BY MS. STERLING:

20 Q. If you would, sir, please state your full name for the
21 Court.

22 A. Zachary Robert Howlett.

23 Q. And, Mr. Howlett, how are you employed?

24 A. I'm employed through the Virginia Department of Game and
25 Inland Fisheries.

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1 Q. And what is your title and position?

2 A. Conservation police officer.

3 Q. And what does that entail?

4 A. It entails hunting, trapping, fishing laws, as well as
5 boating laws.

6 Q. And you are charged with enforcing those laws?

7 A. Yes, ma'am.

8 Q. And how long have you been in that position?

9 A. Since September of 2016.

10 Q. Okay. Were you so employed in December of 2018 and
11 January of this year 2019?

12 A. Yes, ma'am.

13 Q. Okay. In December of 2018 did you become involved in an
14 investigation of a purported baiting in the area of the
15 Gordon's Creek off Chickahominy River and James City County,
16 Virginia?

17 A. Yes, ma'am.

18 THE COURT: Which creek, I'm sorry? Did you say
19 Gordon's Creek?

20 MS. STERLING: The Gordon's Creek, I'm sorry, Your
21 Honor. Gordon's Creek.

22 THE COURT: Thank you.

23 THE WITNESS: Yes.

24 BY MS. STERLING:

25 Q. And if you for the Court just --

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1 MR. ROBERTS: Pardon me, Judge. If it please the
2 Court, my research indicates that it's Gordon Creek. It is
3 often called Gordon's Creek. But, for the record, I think
4 it's Gordon Creek.

5 MS. STERLING: Gordon without the S; is that
6 correct?

7 MR. ROBERTS: Either way.

8 THE WITNESS: Either way, yes.

9 BY MS. STERLING:

10 Q. Okay. Is it called Gordon without the S?

11 A. I believe so, yes.

12 Q. Okay. All right. Thank you for that. And that's off of
13 Chickahominy River; is that correct?

14 A. Yes, ma'am.

15 Q. And James City County?

16 A. Yes, ma'am.

17 Q. And where, approximately, is that?

18 A. It would be just south of Jolly Pond and Centerville Road
19 are the closest roads in the Williamsburg area near Ford's
20 Colony.

21 Q. Okay. In the Williamsburg area. Okay. And that area is
22 in the Eastern District of Virginia; is that correct?

23 A. Correct.

24 Q. Okay. And how did you become involved in this
25 investigation and when did your involvement occur?

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1 A. I was informed December 22nd, 2018 by another CPO Charles
2 Leftwich --

3 Q. Is that a conservation police officer?

4 A. Yes, ma'am.

5 Q. Yeah. Okay. Thank you. Go ahead.

6 A. He informed me about a baited site at the very back end
7 of Gordon Creek.

8 MR. ROBERTS: Well, Judge, I think baited site
9 calls for a conclusion. If the officer can just tell us
10 what the other officer saw, I'm not going to object to the
11 hearsay, but baited implies an intent without more
12 information. Do you agree?

13 MS. STERLING: That's fine.

14 BY MS. STERLING:

15 Q. If you could tell us what he said in terms of what he
16 observed.

17 A. He had said that he had saw corn and Milo at the back of
18 the creek.

19 Q. And that's Gordon Creek?

20 A. Yes, ma'am.

21 Q. And where is the back of the creek? Where,
22 approximately, is that?

23 A. It would be at the very end of West Port Road, which is a
24 subdivision off of Ford's Colony off of Centerville Road. He
25 was able to provide me with GPS locations off of his phone

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1 from where he initially saw it.

2 Q. Okay. And is Westport a residential area?

3 A. It is.

4 Q. And Ford's Colony also a residential area in
5 Williamsburg?

6 A. It is.

7 Q. Okay. Based on that information, what did you do?

8 A. I was able to locate -- the best entrance in through West
9 Port Road, was able to walk down through an access road that
10 wasn't gated and was able to walk right down to the marsh
11 where the GPS location was. With that spot I was able to
12 find the corn and the Milo that was described to me.

13 Q. And what exactly did you see on December 20, what was it,
14 the 23rd --

15 A. 23rd is when I officially went down.

16 Q. And you -- the location you went to was the location, the
17 GPS location that you had gotten from the other officer,
18 correct?

19 A. Correct.

20 Q. So tell us specifically what you observed.

21 A. From there all I did was walk onto the marsh. As soon as
22 I walked onto the marsh, I was able to see corn and Milo both
23 floating and on the bottom of the -- on the surface water --
24 basically on the bottom of the little creek bed there when
25 the tide was out.

1 Q. Okay. So was the area, was it in the water or --

2 A. It was a tidal area, so it would be -- it was a low tide
3 when I walked out. But depending on the tide, it would have
4 been somewhat underwater but it was essentially a marsh.

5 Q. Okay. And what kind -- what was the quantity of corn and
6 Milo that you observed?

7 A. I'm going to say a noticeable amount to where you could
8 see it as far as you -- you know, as soon as you walked out,
9 I was able to see it. I don't know as far as quantity, if
10 you're looking for an amount or --

11 Q. Could you -- no. No. It was clearly visible as you
12 approached?

13 A. Correct. As soon as I stepped onto the marsh, I could
14 see.

15 Q. Was it something you needed to search for or was it --

16 A. I could look down and see it right at my feet. I mean...

17 Q. Okay. And so how far out in the marsh did it go, if you
18 know that?

19 A. At the low tide I would probably say at least 10 feet out
20 from where the marsh started out to the creek channel, 10
21 feet from there.

22 Q. Okay. And what's the significance of finding corn and
23 Milo in the water?

24 A. Unless -- at that area, very rare.

25 Q. And, okay, and what does that mean?

1 A. There is no agricultural fields anywhere in that area.
2 There is nothing in that vicinity that has corn or Milo in
3 that area.

4 Q. Okay. In your experience, what, if you have any, as a
5 reason you would find corn and Milo in a marsh and creek
6 area?

7 A. It would be to bait ducks.

8 Q. And by baiting you mean what?

9 A. By placing grain or any type of any other attractant that
10 would attract migratory water fowl.

11 Q. And how is that that -- how are they attracted to that,
12 corn -- both corn and Milo, correct?

13 A. It's a source of feed for them. So they would be able to
14 see -- see the corn from the air. It would attract them in
15 to feed there, and they would stay there as long as any type
16 of food source was present till it was gone.

17 Q. Okay. When you went down on this occasion, did you see
18 migratory game birds in the area?

19 A. Yes, ma'am.

20 Q. And about how many or what was their pattern, anything
21 unusual?

22 A. Every time I was down there, several dozen ducks would
23 get up as I walked onto the marsh, as well as geese were
24 present as well.

25 Q. What were they getting up from?

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1 A. The immediate area from where the corn and Milo was.

2 Q. All right. And had you been in that area before?

3 A. Prior to the 23rd, no.

4 Q. Okay. And when you approach a marsh and creek area, is
5 it unusual to see that many ducks in the area?

6 A. Congregated in that concentration in that small area,
7 yes.

8 Q. Okay. When you say in that small of an area, how small
9 of an area was it?

10 A. I would say roughly -- roughly 75 yards long.

11 Q. And so were they all -- were the group of ducks all
12 together?

13 A. Correct.

14 Q. And the geese were all together?

15 A. Correct.

16 Q. Is that, in your experience, unusual?

17 A. Not unusual as see them together, but, like I said, in
18 that concentration where you've got several dozen, especially
19 in that area, yes, it's unusual.

20 Q. And when you say it's unusual, what would you normally
21 expect to see?

22 A. I would say less than a dozen here and there, not, you
23 know, concentrated in that dense of amount.

24 Q. And you say that based on your experience as a
25 conservation officer?

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1 A. My experience as a conservation officer and my experience
2 in hunting, I've never seen that dense of amount in the
3 certain area over that prolonged period of time.

4 Q. And how long have you been in migratory -- you're a bird
5 hunter, migratory game bird hunter?

6 A. Correct.

7 Q. And how long have you been a hunter?

8 A. Since I was 12 years old.

9 Q. And are you from the Williamsburg area?

10 A. I have lived in Williamsburg since 2001.

11 Q. So have you been hunting in that area?

12 A. Correct.

13 Q. Okay. I want to show you what's been marked as
14 Government's Exhibit Number A.

15 I'm going to show this to him, Your Honor, and then
16 I'm going to put it on the overhead so it's visible to the
17 Court, as well.

18 I'm going to give you a pen. I -- this -- let me
19 have you identify it first. Could you tell me what that is?

20 A. This is a map of the immediate area where the hunters
21 were located the day that we observed any activity that shows
22 the location of the hunters and as well as the property
23 boundaries in the immediate area where Gordon's Creek is.

24 Q. Okay. So just for the record, to give the Court a better
25 background, your original investigation, you went out there

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1 on December 23rd, but when is the date when -- when you came
2 in contact with Mr. Childers?

3 A. The January 19th, 2019.

4 Q. And it was in the Gordon Creek area which you
5 investigated on December 23rd; is that correct?

6 A. Correct.

7 Q. And that is a map of the Gordon Creek area which you
8 investigated on the 23rd and in which you contacted
9 Mr. Childers on the 19th of January; is that correct?

10 A. Correct.

11 Q. And on that map, if you could, clearly mark the area
12 where you saw Mr. Childers on the 19th of January.

13 A. (Witness complied.) It's going to be a little hard to
14 see the red, but it's where the green dot is.

15 Q. Okay. There was a previous mark on it that was a small
16 circle, correct?

17 A. Right.

18 THE COURT: You show it to defense counsel.

19 MR. ROBERTS: It's been shared with me in
20 discovery, Judge, and we are going to try and use the
21 overhead. I don't object subject to brief voir dire in
22 regard to the map, if I may.

23 MS. STERLING: I would move to admit this map, Your
24 Honor. I wanted to leave it up for -- as a reference point.
25 The mark that the officer made, it's a circle around a

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1 little green dot.

2 THE COURT: I see that.

3 MS. STERLING: Can you see that, Your Honor?

4 THE COURT: So just to the -- underneath the
5 Westport Neighborhood Association, Inc.?

6 MS. STERLING: Yes, Your Honor. Yes, Your Honor.

7 THE COURT: And the body of water that dot is
8 adjacent to, is that Gordon Creek?

9 MS. STERLING: It is, Your Honor. And, again,
10 thank you. We move to admit that as Government's Exhibit
11 Number 1, and we are going to leave it up for reference
12 purposes.

13 MR. ROBERTS: Subject to voir dire of the witness,
14 I don't object to it.

15 MS. STERLING: Okay.

16 THE COURT: I'll reserve ruling --

17 MS. STERLING: Okay. Thank you.

18 THE COURT: -- pending that voir dire.

19 BY MS. STERLING:

20 Q. All right. And so when you went out there on the 23rd of
21 December, you indicated you saw both corn and Milo, correct?

22 A. Correct.

23 Q. Let me show you what's been previously marked as
24 Government's Exhibit Number 2 and ask you to identify this
25 photograph.

1 MR. ROBERTS: I've been provided this in discovery,
2 Judge.

3 MS. STERLING: Right.

4 MR. ROBERTS: Again, subject to voir dire.

5 BY MS. STERLING:

6 Q. If you would identify it.

7 A. This is the corn that I was able to find on the 23rd of
8 December on my first trip back into the marsh.

9 MS. STERLING: Okay. Thank you. I would move to
10 admit what's been marked as Government's Exhibit Number 2,
11 Your Honor.

12 THE COURT: I will reserve on that pending defense
13 counsel's questioning of Government's Exhibit 2.

14 BY MS. STERLING:

15 Q. All right. Now, you said you saw the corn and Milo in
16 the area -- on the 23rd. We are still on the 23rd?

17 A. Correct.

18 Q. Are those two grains commonly used to attract -- attract
19 ducks for hunters?

20 A. Correct.

21 Q. And is that known to hunters and law enforcement officers
22 involved in the protection of migratory game birds?

23 A. Yes, ma'am.

24 MR. ROBERTS: Well, I object to what hunters know,
25 Judge.

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1 BY MS. STERLING:

2 Q. Is that done to you as a hunter?

3 A. Yes, ma'am.

4 MR. ROBERTS: I'm sorry.

5 MS. STERLING: I'm sorry. I meant for him
6 personally.

7 BY MS. STERLING:

8 Q. Okay. All right. Now, what did you do after your
9 observations on December 23rd?

10 A. After December 23rd, the corn models, photographed the
11 event, set up cameras at the entrance to Westport going back
12 into the lot that I used to access. I'll get you the exact
13 date here. Well, we had placed two trail cameras set on the
14 26th of December. One was facing the entrance to Westport
15 into that lot where there was a little parking area that
16 was -- looked like it had been recently used, and we also set
17 a camera up overlooking the marsh, would be just to the left
18 of the green dot on the map if you were looking at the map.

19 Q. So from my -- if you could please describe the Westport
20 area. It's a residential area?

21 A. It is a residential area. There is not very many homes
22 in there. When the investigation was going on, there's a few
23 rentals in there. The back cul-de-sac that you can see on
24 the map, there was only, I believe, one house being currently
25 built back there at the time. And then this was a vacant lot

1 at the time.

2 Q. When you say "this was a vacant lot," the lot which you
3 traversed in order to get to the marsh --

4 A. Correct.

5 Q. -- that you observed is a vacant lot?

6 Okay. So who owns that property, the lot near the
7 properties within the Westport -- can I call it -- is it a
8 housing development?

9 A. Correct.

10 Q. There is an actual development? Okay.

11 A. At the time it was Marine Land Holdings. I know since
12 then it has changed ownership to the Westport Neighborhood
13 Association, but at the time it was under Marine Land
14 Holdings.

15 Q. So the lot that you crossed to get to the marsh, was that
16 owned by Meridian?

17 A. Yes, ma'am.

18 Q. Okay. And would the -- was there public access to the
19 Westport development?

20 A. It's off of Centerville Road, which is a public road. To
21 get into Westport in the neighborhood there is a no
22 trespassing video surveillance sign posted at -- on the
23 entrance road going into Westport.

24 Q. Is there a gate or is it just --

25 A. There is no gate.

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1 Q. Okay. All right. But the sign is clearly posted?

2 A. It is clearly posted in the median.

3 Q. Okay. And were there any other signs posted?

4 A. Not back on the lot at all.

5 Q. Okay. So but there isn't anything within Westport other
6 than lots and homes on which -- lots on which homes have been
7 built in and empty lots; is that --

8 A. Correct.

9 Q. Okay. Was there anything going on in there at the time
10 that you recall, any type of --

11 A. On the actual lots --

12 Q. Well, in Westport in general?

13 A. Just construction for home building.

14 Q. Okay. So we've heard this today on this camera, one was
15 at the entrance to the neighborhood, correct?

16 A. At the entrance to the West -- the lot that we were using
17 to access --

18 Q. Oh, okay.

19 A. -- swamp, not at the entrance --

20 Q. Okay.

21 A. The entrance to Westport has its own security cameras.

22 Q. All right. So there is a security camera there and you
23 put up one at the entrance to the lot and then one down by
24 the marsh, correct?

25 A. Yes, ma'am.

1 Q. Okay. And what was the purpose of those surveillance
2 cameras? Why were you engaged in putting those up?

3 A. At the time we weren't sure they were coming in and
4 through -- to access through the lot or if they were coming
5 in by boat. So we had the one camera overlooking the creek
6 channel, if they were going to come in by boat, or you had
7 the other camera set up at the entrance to the lot because
8 you could see tire tracks up and down the parking area on the
9 vacant lot because we didn't know if they were coming in that
10 way, so we --

11 Q. You said were tire tracks from the roadway, the
12 cul-de-sac down to the waterway?

13 A. Correct.

14 Q. Okay. And when you say "they" --

15 A. We didn't know who, we just --

16 Q. You don't know who, just people -- someone was coming
17 down in a vehicle?

18 A. Correct.

19 Q. Okay. So you put those surveillance cameras up to see
20 who, if anyone, was coming down?

21 A. Correct.

22 Q. And how long were the cameras up?

23 A. My camera, I believe, was up -- which my camera was the
24 one at the entrance to the lot, was up for about a week and a
25 half. The camera overlooking the marsh, I believe, was up

1 for several weeks.

2 Q. Okay. And did you subsequently review surveillance film
3 from those cameras?

4 A. I did. The cameras from the ones that we had set up and
5 the cameras at the entrance -- that Ford's Colony with
6 Westport had at their entrance as well.

7 Q. So you looked from the entrance to Westport and then from
8 the entrance to the lot area?

9 A. Correct.

10 Q. You reviewed both of those?

11 A. Correct.

12 Q. And what about down by the marsh, did you review those?

13 A. Correct.

14 Q. And what, if anything, did you see on those cameras?

15 A. We were able to see, on the 27th of December, as well as
16 the 26th, two different vehicles pull into the lot at
17 Westport there where my camera was set up, and on the 27th we
18 were able to see Mr. Childers and his son walking down
19 towards the creek. I believe they were down there for
20 approximately 20 minutes before they returned back to the
21 vehicle and left.

22 Q. So did the camera reveal that they parked on the lot or
23 adjacent to the lot?

24 A. They had parked on the lot. My camera was facing down
25 towards the swamp, so they would have been driving onto the

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1 lot and parked on the lot and walked down to the swamp.

2 Q. And, again, this was the lot that Meridian Land Holdings
3 owned it?

4 A. Correct.

5 Q. Okay. And so you saw -- how were you able to identify
6 them?

7 A. We were able to get a license plate off of the vehicle
8 driven, and through the pictures, it's pretty clear that
9 later on --

10 Q. And when you say Mr. Childers, you mean Mr. Larry
11 Childers?

12 A. Yes.

13 Q. And did you know Mr. Childers prior to this date?

14 A. No, ma'am.

15 Q. Do you see him here today?

16 A. Yes, ma'am.

17 Q. Could you point him out for us.

18 A. Down there to my right.

19 THE COURT: For the record, he has identified the
20 defendant, Larry Childers.

21 MS. STERLING: All right. Thank you.

22 BY MS. STERLING:

23 Q. So you saw Mr. Childers and his son -- how far down into
24 the lot did the vehicle go?

25 A. From the entrance of the cul-de-sac from the lot probably

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1 150 feet.

2 Q. And did the surveillance camera reveal that they exited
3 the vehicle?

4 A. Correct.

5 Q. And walked down?

6 A. Correct.

7 Q. Okay. And were you able to see what they were doing?

8 A. Oh, yeah.

9 Q. And I believe you testified the approximate time that
10 they were out of the vehicle was 20 minutes; is that correct?

11 A. Correct.

12 Q. And then what happened?

13 A. We were able to -- like I said, they -- we were able to
14 get them on camera at 9:58 a.m. that morning of the 27th.

15 And they were in there on the 27th after 10:00 p.m. -- or
16 after 10:00 a.m., I'm sorry, from the Westport camera.

17 That's when, I believe, shortly after that I was able to,
18 like I said, to obtain that after pulling my camera from
19 there. We left the one, the camera in the marsh was set up
20 still, but I had pulled my camera from the entrance shortly
21 after that.

22 Q. And I believe you said there was also another individual
23 on the camera?

24 A. There was. That individual was seen on the 26th,
25 actually --

1 MR. ROBERTS: Well, I'm going to object to the
2 relevance of that, Judge. I mean, we are talking about an
3 event on the 19th of January. He's laying the foundation as
4 to why he went there on that day. I don't know whether --

5 MS. STERLING: I'll move on with that, Your Honor.

6 BY MS. STERLING:

7 Q. Did you see anybody else other than Mr. Childers and this
8 other individual?

9 A. No.

10 Q. Okay. And that was for a week to ten days?

11 A. From the 23rd till the day I made contact with
12 Mr. Childers on the 19th.

13 Q. About how long was the surveillance -- the surveillance
14 cameras weren't up that whole time, were they?

15 A. They probably -- the longest was the one on the marsh
16 which would have been from -- when was it -- the 26th, that
17 was probably up till sometime around the new year --

18 Q. Okay.

19 A. -- before it came down.

20 Q. All right. Based on your knowledge and information,
21 would there be any reason for someone to be on that lot?

22 A. Not to my knowledge, no.

23 Q. Okay. And is this -- the area where the lot is and down
24 to the marsh, is this an area where migratory game bird
25 hunting normally occurs?

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1 A. That far -- on the creek, yes, but that far back, in
2 my -- you know, personally, no, I haven't seen anybody hunt
3 back in there.

4 Q. On Gordon -- how long is Gordon Creek? Is it a --

5 A. It's several miles long.

6 Q. Are there areas in Gordon Creek where migratory game bird
7 hunting regularly occurs?

8 A. There is.

9 Q. And where and what type of areas are these?

10 A. It's mostly done from stationary blinds that are owned
11 either through private parties or through hunt clubs, but
12 they are all farther out towards the mouth of the creek.

13 Q. And are there many of those?

14 A. I would say there's -- there's several, yes.

15 Q. Okay. Is it normally the case that hunters like to hunt
16 from blinds, in your experience?

17 A. Yes, either from a stationary blind or a floating blind.

18 Q. Okay. And you didn't see any blind in this area of
19 Gordon Creek where you were examining and finding the Milo
20 and the corn, correct?

21 A. No, ma'am.

22 Q. Okay. All right. Okay. So you said that you came back
23 to this area a second time, another time -- after the 23rd
24 you came back again. What date was that?

25 A. After the 23rd, I was back on the 26th at 7:24 in the

1 morning. I sat down there for a short brief time. Didn't
2 observe any shots that day or that morning. While returning
3 back on the 26th at 1523 where we placed the cameras up,
4 didn't return back -- another Officer Joyce was in that area
5 on the 9th of January, and then I didn't return back until
6 the 18th of January.

7 Q. Okay. And so what happened on the 18th? What did you do
8 on that date?

9 A. 18th of January I walked down to the marsh again, and I
10 could see that it was -- there was a heavy amount of Milo at
11 the same area that I had seen the corn and the Milo. It
12 looked like it had been replenished or restocked in that same
13 area.

14 Q. Did you see corn, as well, or -- well, was there anything
15 different about the way that it looked and what you observed
16 on the --

17 A. There was still some corn present but it was mainly Milo
18 on the 18th when I was in there.

19 Q. And why do you say you think it was -- it looked like it
20 had been replenished?

21 A. Every time on the 18th when I went back, there was a lot
22 more in that area than what I'd originally seen on the
23 23rd --

24 Q. Okay.

25 A. -- and on the 26th.

1 Q. Well, when you were there, did you see a lot of -- did
2 you see birds on the 26th?

3 A. Every time I was in there, I saw birds.

4 Q. And what were they doing and how many of them were --

5 A. Every time I walked down to the marsh, several dozen
6 ducks would jump up, would flush out of the area, as well as
7 geese.

8 Q. So that happened on the 23rd, the 26th and --

9 A. And January 18th.

10 Q. -- January 18th? Was it about the same number of birds,
11 the same type of activity?

12 A. Same type of activity, yes.

13 Q. Do you know about the same number of birds?

14 A. I would say the same number of birds. The morning of the
15 19th I was able to still observe birds flush out of the area
16 right at daylight -- well, right before daylight.

17 Q. And is that unusual?

18 A. Um, on the 19th I would say that the birds flushed out
19 when the boat came in to the creek there. There was several
20 dozen geese that got up that morning and several dozen --

21 Q. So are we talking about the 18th -- let's talk about the
22 18th.

23 A. The 18th.

24 Q. We are going to talk about the 18th.

25 A. The 18th, like I said, several dozen geese, several dozen

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1 bigger ducks.

2 Q. And did you take photographs of the area also on the
3 18th?

4 A. I did.

5 Q. Let me show you what's been previously marked as
6 Government's Exhibit Number 3.

7 MR. ROBERTS: Same objection, subject to voir dire.

8 BY MS. STERLING:

9 Q. Can you identify that photograph, please?

10 A. This is a photo I took on the 18th of January. It's a
11 log underneath the water's surface, and on top of that log is
12 Milo.

13 Q. All right. That similar to what --

14 MR. ROBERTS: Is that Government's Exhibit 3?

15 MS. STERLING: It is, Your Honor. Thank you. We
16 would move to introduce what's been marked as Exhibit Number
17 3, Government's Exhibit Number 3.

18 THE COURT: I'll reserve pending cross-examination.

19 MS. STERLING: Okay. Thank you, Your Honor.

20 BY MS. STERLING:

21 Q. And so you returned after the -- you took these
22 photographs, you didn't see anyone out there on the 18th?

23 A. Correct.

24 Q. And when did you return next?

25 A. I returned back the next morning on the 19th. I had

1 Officer Joyce drop me off at the vacant lot probably around
2 5:45 that morning.

3 Q. Okay. Prior to sunrise?

4 A. Yes, ma'am.

5 Q. And so what did you do when you arrived there?

6 A. I was able to position myself on the north -- on the
7 woodbine overlooking where I saw the baited area.

8 Q. Okay. Were you able to see -- did you see birds when you
9 arrived?

10 A. When I arrived, it was dark, so I couldn't see any.
11 However, like I said, when the boat came in, my understanding
12 by boat, several dozen geese, several dozen ducks all flushed
13 out of the area.

14 Q. Okay. So tell us everything that you observed when you
15 arrived. You went down to a knoll and you were watching the
16 area. Did you see anyone there?

17 A. There was nobody there at the time that I got there. At
18 approximately 6:37 in the morning, a jon boat with a mud
19 motor was coming up the creek. The operator dropped two
20 hunters off of the shoreline directly in front of me.

21 The operator of the boat made his way a short
22 distance up the creek from where the two hunters were dropped
23 off. You could hear them essentially -- look at the -- on
24 the shoreline, and the operator of the boat walked over
25 towards where the original two hunters were dropped off.

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1 Q. So there were a total of three hunters?

2 A. Yes, ma'am.

3 Q. Okay. And then what did you observe beyond that?

4 A. After he dropped the three hunters off, I noted the first
5 shot at 6:56 that morning, and the second shot at 7:14 that
6 morning. I didn't make contact with the hunters until 8:10
7 that morning. In that time that he had dropped -- whomever
8 was dropped off and on the shoreline, there was no duck calls
9 or goose calls being made at all. No decoys were placed out
10 at all either.

11 Q. And is that unusual?

12 A. In my experience, yes. To not have decoys out, I've
13 always hunted with decoys.

14 Q. And in your capacity as a law enforcement officer, is it
15 unusual to see people, duck hunters hunting without decoys or
16 duck calls?

17 A. This would be the first time that I have ever checked
18 anybody that hasn't had decoys out.

19 Q. Okay. And you indicated, I believe, that when the boat
20 came up, that that flushed out the ducks and geese causing
21 them to get off -- fly up off the ground, correct?

22 A. Correct.

23 Q. And that was, again -- I believe you indicated that kind
24 of the same number, a couple dozen?

25 A. Correct.

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1 Q. And that unusual -- okay. So you heard the two shots.

2 Did you hear any more shots?

3 A. I only heard the two shots.

4 Q. And -- all right. You said that at 8:10 you made contact
5 with the hunters. Tell us about that, if you would, please.

6 A. All the hunters, they were standing on the shoreline in
7 the marsh. I first made contact with James Childers on -- he
8 was up off of the marsh. He had come up, I believe, to use
9 the restroom, but I'd made contact with him before he was to
10 use the restroom.

11 At that time asked him to call the other two hunters
12 that were back on the marsh back so that I could do a
13 compliance check for hunting licenses as well as safety
14 equipment inspection on the vessel.

15 Q. And in the course of your investigation did you determine
16 the relationship between James Childers and Mr. Larry
17 Childers?

18 A. During license check.

19 Q. What's Mr. James Childers' relation to Larry Childers?

20 A. It's his father.

21 Q. Which is it? Larry is the father?

22 A. Larry is the father, yes.

23 Q. Okay. And how old is James Childers?

24 A. I believe at the time he was 17.

25 Q. So he was a juvenile, correct?

1 A. Yes, ma'am.

2 Q. Okay. And the third person, who was that?

3 A. The third person was a Brandon Hodge, I believe, his last
4 name is pronounced. He was a friend of James Childers.

5 Q. Okay. Was he at -- do you know how old he was?

6 A. He had just turned 18.

7 Q. Okay. All right. Go ahead. So you came in contact with
8 Mr. Childers and then the others and you did a compliance
9 check, correct?

10 A. Correct.

11 Q. And that did involve getting their identifying
12 information, correct?

13 A. Correct.

14 Q. And then what else did you do?

15 A. We were able -- after we did a compliance check with
16 licenses, Mr. Childers and myself and Officer Joyce walked
17 over to where the boat was parked at. We did a safety
18 compliance check. While doing the safety compliance check,
19 while Mr. Childers was on the boat, I could look down and
20 standing right next to the boat and see Milo at the base of
21 the boat in the water right at my feet.

22 After a safety compliance check, everything was fine
23 with that, I called all the hunters back over to the group,
24 and that is when I informed them that they were hunting over
25 the baited area.

1 Q. Okay. You informed the three of them together?

2 A. Correct.

3 Q. And did you have any specific conversations with
4 Mr. Larry Childers?

5 A. When we first made contact, I had asked Mr. Childers if
6 they had shot anything that morning. Mr. Childers had stated
7 that they had shot two birds. When I asked who shot them,
8 they said that the boys both shot the first one, meaning I
9 guess they shot the same exact time, and that he had shot the
10 second one.

11 I asked about the spot that they were hunting, about
12 how often they hunt the area. Mr. Childers said that they've
13 hunted it before and that they walked from a private ramp.
14 Then after the compliance check, I informed all of them that
15 I knew about the bait in the creek. Mr. Childers kind of
16 gave a flabbergasted look on his face after I made that
17 comment. Mr. Childers also stated that the individual that
18 put the bait out was not hunting with them. I questioned
19 Mr. Childers about the name of the individual that placed the
20 bait but did not want to give any names to me.

21 Mr. Childers made the acknowledgement that he knew
22 the bait was there, but also commented that since he did not
23 put the bait out, that they were good to hunt the area. At
24 that time I informed Mr. Childers that it was still a baited
25 area, asked the boys if they knew it was a hunting -- if it

1 was baited. Mr. Childers replied for them and stated no,
2 they didn't.

3 Q. Mr. Larry Childers replied?

4 A. Yes.

5 Q. And so did you -- did you look at the birds that had been
6 shot?

7 A. The two birds that were shot were two drake mallards.

8 Q. And those are migratory game birds within the meaning of
9 the migratory bird --

10 A. Yes.

11 MR. ROBERTS: We will stipulate they were game
12 birds, they were migratory, they were mallards, and that
13 there is no issue with the chain of custody, Your Honor.

14 MS. STERLING: Thank you.

15 THE COURT: Thank you.

16 BY MS. STERLING:

17 Q. All right. And did you ask him any specific questions
18 about when he said -- he -- he -- about you said he knew that
19 the area had been baited; is that correct?

20 A. Correct.

21 Q. And did he indicate when he knew that to have occurred or
22 if he knew?

23 A. He had stated that it was sometime during the -- it would
24 have been the split, which when duck season is out.

25 Q. And what exactly does the split mean?

1 A. When duck season goes out, we just -- we call it a split
2 to where you have the first split during early duck season,
3 second split, and the third split. So this would have been
4 just before.

5 Q. So when duck season starts, the split means there is a
6 period of time when you can't hunt and then the second phase
7 begins; is that correct?

8 A. Correct.

9 Q. Do you happen to know when that time was?

10 A. I believe it was sometime during the December 2nd through
11 the end of December 19th of that year.

12 Q. And that -- in December of 2018?

13 A. Correct.

14 Q. Okay. All right. And -- okay. The -- did you speak
15 with Mr. Childers about the property, the lot?

16 A. I did. I asked Mr. Childers if he had permission, since
17 we were standing on the shoreline --

18 MR. ROBERTS: I'm going to object to the relevance,
19 Judge. He's only charged with hunting over bait, not
20 trespassing or --

21 THE COURT: What's the relevance?

22 MS. STERLING: Your Honor, it just goes to the
23 total picture of what is going on here and how he is there
24 and why he is there. And I was just indicating that there
25 was -- it was not a public place, and it was not a place

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1 where he could have otherwise accessed the creek.

2 THE COURT: I'll overrule the objection for what
3 it's worth. I do note he's not charged with trespassing or
4 there is no foundation.

5 MS. STERLING: That's correct, Your Honor.

6 THE COURT: You may finish answering your question,
7 Mr. Howlett.

8 THE WITNESS: Finish answering the -- he just
9 stated that they had permission when there was -- he said it
10 was a gentleman named Tommy, and the adjacent landowner in
11 that area is a Tommy Hitchens, which you can see on the map
12 where Thomas Hitchens has his property lines. I did speak
13 with Mr. Hitchens --

14 MR. ROBERTS: Well --

15 BY MS. STERLING:

16 Q. Were you able to determine whether that was Mr. Hitchens'
17 property?

18 A. It was not.

19 Q. Thank you. All right. I want to show you now what's
20 been marked as Government's Exhibit Number 4 and ask you to
21 identify that for me, please, and tell me the date on which
22 it was taken.

23 MR. ROBERTS: Same situation with this -- I have
24 been provided subject to voir dire, Judge.

25 THE WITNESS: This was the area the hunters were

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1 hunting in just off of the shoreline from coming down off of
2 Westport off the vacant lot. This is looking back towards
3 the back end of the creek. The two main trees that you see
4 at the back of the picture would have been the general area
5 where the boat was when we did the compliance check. This
6 was taken on the 19th, the day of the exam.

7 BY MS. STERLING:

8 Q. Okay. And we'd -- that was marked as Government's Number
9 4?

10 A. 4.

11 MS. STERLING: We would move to introduce this.

12 THE COURT: All right. I'll reserve on that
13 pending cross-examination.

14 BY MS. STERLING:

15 Q. And let me show you what's been marked as Government's
16 Exhibit Number 5 and ask you to identify that, please.

17 MR. ROBERTS: Again, the government's been kind
18 enough to provide all these photos, Judge. It's the same
19 situation, if it please the Court.

20 THE WITNESS: This is just a close-up of the water
21 there. It's also taken on the 19th that does show Milo
22 underneath the surface of the water.

23 MS. STERLING: We would move to introduce what's
24 been marked as Government's Exhibit Number 6.

25 THE COURT: 5?

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1 MS. STERLING: I'm sorry, Your Honor, 5. Thank
2 you.

3 THE COURT: I will reserve on that photo as well.
4 BY MS. STERLING:

5 Q. And let me hand you what's been marked as Government's
6 Exhibit 6.

7 MR. ROBERTS: Oh, this is what we stipulated?

8 MS. STERLING: Yes. Yes.

9 MR. ROBERTS: Yes, sir. That's -- I have no
10 objection. This is the chain, I believe.

11 THE WITNESS: This was Milo that was recovered from
12 the marsh area on the day of the 19th.

13 MS. STERLING: We would move to introduce that,
14 Government's Number 6.

15 THE COURT: It will be admitted and received into
16 evidence. The defendant says they stipulate.

17 (The document was received in evidence as
18 Government's Exhibit No. 6.)

19 BY MS. STERLING:

20 Q. One last one for you, Mr. Howlett. Government's Exhibit
21 Number 7.

22 MR. ROBERTS: No objection to this rather ghastly
23 photo, Your Honor.

24 THE WITNESS: Two drake mallards that were seized.

25 MS. STERLING: We would move to introduce that

1 exhibit as well.

2 THE COURT: Government's Exhibit 7 will be received
3 into evidence.

4 (The document was received in evidence as
5 Government's Exhibit No. 7.)

6 BY MS. STERLING:

7 Q. And, Officer Howlett, based upon your investigation on
8 the 19th, what did you do?

9 A. At the time, after speaking with all them, one gentleman
10 had a violation for a state hunting license, but I informed
11 all the hunters that I would be getting back in touch with
12 them after speaking with U.S. Fish & Wildlife on the baiting
13 charges.

14 MS. STERLING: Okay. All right. Thank you.

15 THE COURT: Cross-examination, Mr. Roberts.

16 MR. ROBERTS: Thank you, Your Honor.

17 CROSS-EXAMINATION

18 BY MR. ROBERTS:

19 Q. Officer Howlett, good morning. I'm going to ask you a
20 series of questions that deal with three basic topics. The
21 first I'm going to hopefully work with you on this map that
22 the Court has -- and that everyone has on the screen.

23 The second I'd like to question you about duck
24 hunting, your experience with duck hunting, and some of the
25 statements you've made under oath about duck hunting.

1 Now I'd like to talk to you more about what happened
2 from the 23rd of December of 2018 until the 19th of January
3 of this year. All right. I'll refer you first to the area
4 of Gordon Creek. Your map stops on the lower left-hand
5 corner and indicates the last property -- can you see my
6 finger there?

7 A. Yes, sir.

8 Q. -- Wright, James M., trustee, and Debra S. Trustee,
9 correct?

10 A. Correct.

11 Q. Now, in case the Court is not familiar with Gordon Creek,
12 this creek meanders quite a ways until it reaches a broad,
13 shallow bay called Nayses Bay, correct?

14 A. Correct.

15 Q. About how far from where the map is that -- where I've
16 pointed is Nayses Bay?

17 A. It's several miles.

18 Q. But you indicated on your direct exam you thought the
19 creek was several miles. It's longer than several miles,
20 isn't it, Officer, from the river, from the main body of the
21 river to where you met Mr. Childers' son and Mr. Hodge?

22 A. Correct.

23 Q. Okay. So I don't want you to guesstimate but is it fair
24 to say between 5 and 10 miles from the main body of the
25 river?

1 A. From the main body -- to get all the way back to where
2 the homes were?

3 Q. Correct.

4 A. Correct.

5 Q. Okay. Now, in reference to that, just to inform the
6 Court, between the main body of the river and the point you
7 both circled and tried to -- and have the green dot, there
8 are numerous residences along the body of the creek, are
9 there not?

10 A. Correct.

11 Q. And there are also hunt clubs along the body of the
12 creek, correct?

13 A. Correct.

14 Q. And those are between where the dot is indicated and the
15 main body of the river, right?

16 A. Correct.

17 Q. Just to refresh your recollection, my recollection, is
18 the first hunt club you come to would be called Powhatan,
19 which owns property on both sides of the Gordon Creek,
20 correct?

21 A. Correct.

22 Q. A substantial amount of property?

23 A. Correct.

24 Q. And they are mainly water fowl hunters, are they not?

25 A. Correct.

1 Q. And they have a huge place that they call a reserve where
2 they don't hunt and they feed baits -- feed ducks in the
3 split. Are you aware of that?

4 A. Not to my knowledge.

5 Q. Not to your knowledge. The next hunting club would be
6 called Pinewood adjacent to Powhatan; is that correct?

7 A. Correct.

8 Q. And the next one would be Camp Paradise, again on the
9 same shore of the creek?

10 A. Correct.

11 Q. Then we have Laf A Lot, correct?

12 A. Correct.

13 Q. And that's the opposite shore. And then others farther
14 up which may be just individual hunters, correct?

15 A. Correct.

16 Q. Now, there are also multiple residences, many more than
17 there are hunt clubs along the body of the creek before you
18 get to this dot, correct?

19 A. Correct.

20 Q. And it's true, is it not, that the residences are places
21 where people, you have found in your experience, you've
22 testified to, feed birds, including the water fowl, correct?

23 A. Correct.

24 Q. And when they feed them, they would use the things that
25 you've indicated are used to bait ducks, correct?

1 A. It's a possibility.

2 Q. So bait and food are the same thing depending on the eye
3 of the beholder, correct, Officer?

4 A. Correct. The type of grain that they would be using.

5 Q. Right. Right. Now, let's talk about what's above the
6 dot because I think you testified that this Westport
7 subdivision through which you gained entrance by vehicle is
8 near the end of the creek, correct?

9 A. Correct. Navigable water.

10 Q. Okay. But in high tide you can go up above there all the
11 way to Jolly Pond, can you not?

12 A. It would be difficult to navigate in a boat all the way.
13 I don't know if you could take a boat all the way to Jolly
14 Pond.

15 Q. Have you ever been up there?

16 A. In a boat -- by boat, no. I have been to Jolly Pond but
17 not by --

18 Q. No, I understand. You look down the dam to where
19 Gordon's Creek ends?

20 A. Correct.

21 Q. And Gordon Creek begins, we are still away from the Jolly
22 Pond, empties into the head waters of Gordon Creek, correct?

23 A. Correct.

24 Q. Well, you've had experience as a warden and as a hunter.
25 Clearly, you could access areas where you couldn't go by

1 conventional boat, by a kayak or a canoe, correct?

2 A. Correct.

3 Q. Okay. And that would be above Westport?

4 A. Correct.

5 Q. All right. And that would be a place where people could
6 hunt above Westport, correct?

7 A. Correct.

8 Q. Okay. Now let's talk about Westport. You indicated it
9 wasn't gated, correct?

10 A. Correct.

11 Q. And that there was a no trespassing sign at the entrance?

12 A. As you're pulling into the entrance of Westport, there is
13 a no trespassing sign in the median.

14 Q. Okay. There is also a big sign there on how many lots
15 are for sale, correct?

16 A. I couldn't recall if there is or not.

17 Q. You don't recall?

18 A. No, sir.

19 Q. While there were for sale signs on vacant lots in the
20 subdivision, were there not?

21 A. There were.

22 Q. Right. And these are lots that are not being built upon,
23 correct?

24 A. Correct.

25 Q. All right. And despite this sign and this camera, you or

1 I or the Judge could drive in there to check out the lots and
2 look at the signs, correct?

3 A. Correct.

4 Q. So your concern with the trespassing issue was whether
5 someone had a right to be in there, right? Isn't that true?

6 A. Correct.

7 MS. STERLING: I'm going to object to that at this
8 point because we are not talking about a trespassing charge.
9 I understand he wants to get the factual situation but I
10 don't think the intent of the officer is really --

11 THE COURT: Overruled. I'll allow it, but let's
12 not belabor the point. We are not here for trespassing.

13 MR. ROBERTS: Yes, sir.

14 BY MR. ROBERTS:

15 Q. Now, further discussion about Gordon Creek, Gordon Creek
16 is a tidal creek, is it not?

17 A. It is.

18 Q. And I'm sure the Court knows that means that there is two
19 high tides and two low tides every day, correct?

20 A. Correct.

21 Q. All right. And during -- so that would mean during the
22 period of December 23rd, which is, I believe you said, the
23 initial report, right?

24 A. From myself being there?

25 Q. No, no, from the initial report, December 23rd.

1 A. I was informed December 22nd.

2 Q. 22nd. All right. From December 22nd to January 19th,
3 nine -- that's 28 days, roughly, a month?

4 A. I'll trust your math.

5 Q. Well, don't do that. That would be roughly 120 different
6 tidal changes, correct?

7 A. Correct.

8 Q. And it's true, is it not, that this creek narrows as it
9 approaches -- it's up around, and particularly where you
10 found my client, correct?

11 A. Correct.

12 Q. It's not a uniform width all the way up there?

13 A. No, sir.

14 Q. And so when the tide comes in and the tide comes out as
15 it gets narrower, it runs more swiftly, does it not?

16 A. Correct.

17 Q. Okay. And so for those 28 days, any food or bait or any
18 other substance that was on the surface of the creek had the
19 ability to move anywhere up and down the creek subject to the
20 tides, correct?

21 A. Possibility, yes, sir.

22 Q. And the wind, right?

23 A. Correct.

24 Q. All right. You don't have any evidence, do you, Officer,
25 that this gentleman put out the materials that you saw on any

1 of the dates you've testified, do you?

2 A. No, sir.

3 Q. Okay. Now, you talked about the location of my client,
4 his son and this other gentleman as being in the marsh and
5 one of the photographs -- Judge, may I see the exhibits?

6 THE COURT: You may.

7 BY MR. ROBERTS:

8 Q. Isn't it true, Officer, they weren't standing in the
9 marsh, they were in the woods adjacent to the marsh, correct?

10 A. They were standing in the -- when the tide was out, they
11 would be standing in the tidal area so they would be --

12 Q. All right. Well, let's get it here. Look at this
13 picture.

14 A. I have it.

15 Q. You got it?

16 A. Yes, sir.

17 THE COURT: If you can identify the number that
18 you're referring to on the back.

19 MR. ROBERTS: I'm looking at Exhibit Number 4, and
20 I'm placing that on the projector.

21 Your Honor, can you see that?

22 THE COURT: I see it. Thank you.

23 MR. ROBERTS: Ms. Sterling, you see it?

24 MS. STERLING: I do. Thank you.

25 BY MR. ROBERTS:

1 Q. All right. So see, these two trees you've pointed out
2 were places where the boat was, correct?

3 A. Correct, on the other side of the trees.

4 Q. So the hunters would have been, as you follow my finger,
5 around here somewhere (indicating)?

6 A. That's incorrect.

7 Q. Okay. Put -- where would they have been?

8 A. From where I was taking the picture, they would have been
9 somewhere in that area from where I was taking the picture.

10 Q. So somewhere in here (indicating)?

11 A. Well, back behind from where I was physically standing.

12 Q. Okay. But you didn't get a photograph of the actual
13 wooded line where you found them, correct?

14 A. No, sir.

15 Q. You did not, right?

16 And it would be your experience, as you've testified
17 as a duck hunter, that you wouldn't stand out in the middle
18 of the mud, regardless of the tide, to hunt, more value to
19 conceal yourself, correct?

20 A. Correct.

21 Q. And that's what they were doing?

22 A. Correct.

23 Q. All right. Let's talk about your experience as a duck
24 hunter now. How long have you been a duck hunter?

25 A. I believe the first time I had duck hunted was when I was

1 12 years old with my father.

2 Q. And you're what, 29 now?

3 A. 29.

4 Q. Okay. You said that you found about the same
5 concentration of ducks and geese each of the times you were
6 there, correct?

7 A. Correct.

8 Q. And, obviously, you've attributed that to the fact that
9 there was food out there, correct?

10 A. Correct.

11 Q. Did you see any ducks anywhere else on the creek as you
12 traveled up and down the creek?

13 A. Every time I went in, I went in by foot.

14 Q. So you don't know if there were ducks above the spot or
15 ducks below that spot, nor what concentration they were,
16 correct?

17 A. Correct.

18 Q. Have you ever hunted on Gordon Creek?

19 A. On Gordon's, no, I have not.

20 Q. Okay. Well, is it a fair statement that that's a fairly
21 popular place to duck hunt up and down Gordon Creek?

22 A. If you've got a blind -- if you're part of the hunt club
23 or have a stationary blind with --

24 Q. What about if you've got a floating blind?

25 A. I'm not aware of too many -- I mean, you know, but then

1 you -- the 500 yards of somebody but there's not many --

2 Q. I understand, but subject to the law and you have a
3 right?

4 A. If there is open areas, it would be popular, yes, sir.

5 Q. All right. And you also said, I think when Ms. Sterling
6 asked you, that the concentration that you saw there, you
7 thought, was unusual and attributable to the bait, correct?

8 A. Correct.

9 Q. And there are other reasons, as a duck hunter, I'm
10 speaking, where ducks would concentrate other than the food
11 you saw, correct?

12 A. Correct.

13 Q. Right. It can be what's called a roost; isn't that true?

14 A. Correct.

15 Q. Tell the Judge what a roost is, if he doesn't know?

16 A. A roost would be, you know -- typically at sunset you
17 will get concentrations of water fowl that are roost up for a
18 night, either, you know, if there are ducks, they are going
19 to roost in something up off the swamp, but geese and ducks
20 would probably roost right on the shoreline in a marsh area.

21 Q. Well, is it fair to say this area of Gordon Creek looks a
22 lot like the roost that you've seen as a duck hunter?

23 A. Very recently, yes, sir.

24 Q. Okay. There are also places where ducks concentrate
25 because of an impoundment, correct?

1 A. Correct.

2 Q. All right. Can you tell the Court what an impoundment
3 is?

4 A. Impoundment would be any type of flooded agricultural
5 field such as like a foddered cornfield or a foddered soybean
6 field or a rice field.

7 Q. And that's legal, right?

8 A. Correct.

9 Q. Have you ever been to Hog Island on the James River?

10 A. I have not.

11 Q. Have you ever been to Turkey Island up on the upper James
12 near Richmond?

13 A. I have.

14 Q. Lots of ducks up there, right?

15 A. Yes.

16 Q. Nobody's feeding them up there, are they?

17 A. No.

18 MS. STERLING: Your Honor, I'm going to object now
19 to the relevance of other areas.

20 THE COURT: Sustained. Let's keep it moving here.

21 MR. ROBERTS: Well, Judge, may I comment? I'm
22 trying. He said it was unusual to see a couple dozen ducks
23 and some geese in this area. I'm just trying to
24 cross-examine him about the unusualness of that
25 concentration. That's all.

1 BY MR. ROBERTS:

2 Q. All right. Let's talk about the tides, then. The first
3 time you were out there, Officer, you've indicated that the
4 property, the lot was not posted; is that correct?

5 A. Correct.

6 Q. All right. And tell us again how many days these game
7 cameras that you put up, one looking down the lane on the lot
8 and one looking in the marsh, how many days total were they
9 up?

10 A. I don't have a specific day that mine was put -- both
11 cameras were put up on the 26th of December, and, um, I
12 pulled my camera on the 31st.

13 THE COURT: And that's the parking lot cameras; is
14 that correct?

15 THE WITNESS: Correct.

16 THE COURT: All right.

17 BY MR. ROBERTS:

18 Q. So you don't know the total dates. Well, let's talk
19 about the 26th. This photograph, which is Government's
20 Exhibit 2, I believe that's taken on the 24th, is it not?

21 A. 23rd.

22 Q. 23rd?

23 A. Yes, sir.

24 Q. So you don't know what happened prior to that out there,
25 do you?

1 A. For the three days?

2 Q. Right.

3 A. No, sir.

4 Q. And you don't know what food was placed or whether it
5 floated up or down the creek from people feeding ducks on
6 their residential lots, correct?

7 A. No, sir.

8 Q. All right. Now, I'm going to refer you to then
9 Government's Exhibit 5, and looking at my notes, 5 was taken
10 on the 19th, correct?

11 A. Correct.

12 Q. So between the 26th and the 19th, you don't know what
13 happened, either, do you? When -- or did you say the 1st was
14 the day you removed the camera?

15 A. The 31st was the day that I removed the camera.

16 Q. Of December?

17 A. Of December, yes, sir.

18 Q. So for 18 days you have no idea what happened up there or
19 who might have been feeding or baiting or anything, correct?

20 A. But the lot here, the other camera, although the swamp
21 was still up at that time, we had no evidence of any boat
22 activity on the plotwatcher when we looked --

23 Q. Are you saying it was infrared?

24 A. They are.

25 Q. Okay. But they would not detect anyone outside the view

1 of the camera placing food or bait, would they, obviously?

2 A. Obvious.

3 Q. And we talked about the tide, right?

4 A. Right.

5 Q. Okay. You talk about seeing Mr. Childers on the lot in
6 question on December 27th, correct?

7 A. Correct.

8 Q. And he was with his son?

9 A. Correct.

10 Q. All right. And that was between 9:51 and 10:00, I think
11 you said?

12 A. Correct, I believe.

13 Q. And so that wasn't for 20 minutes, it was roughly about
14 10 minutes, correct?

15 A. Correct.

16 Q. All right. Did you see them with anything in their hands
17 or on their possession like a backpack or a bucket or
18 anything like that?

19 A. No, sir.

20 Q. Okay. Now, you also testified, I think, that in your
21 experience as a duck hunter, that you're familiar with duck
22 hunting, usually done from stationary blinds, correct?

23 A. Correct.

24 Q. But there are other ways, for the edification of the
25 Court, to hunt water fowl, obviously?

1 A. Correct.

2 Q. And they are not unusual, are they?

3 A. No.

4 Q. And I would refer you to floating blinds, correct?

5 A. Right.

6 Q. What is jump shooting?

7 A. Jump shooting, you -- typically, if you're in a -- some
8 type of vessel, um, maybe they'll push ducks out as long as
9 you're not underway through the motor, jump ducks would flush
10 up and you could shoot them that way.

11 Q. But a classic example would be paddling a canoe with one
12 man paddling, one man in the front with the firearm, correct?

13 A. Correct. Correct.

14 Q. And that's pretty usual, isn't it?

15 A. Um, in that section of Gordon's Creek, I would say no.

16 Q. Have you ever seen anybody jump shoot there?

17 A. No.

18 Q. But you've never been there before December the 22nd,
19 right?

20 A. Correct.

21 Q. All right. So you really can't say whether people jump
22 shoot it?

23 A. Correct.

24 Q. All right. And another way is to find a place where
25 there's natural cover of brush and shoot from the bank,

1 correct?

2 A. Right.

3 Q. All right. And I won't go into sink boxes and curtain --
4 but the point is there are a lot of usual ways to water fowl
5 hunt other than from a stationary blind?

6 A. Correct.

7 Q. You've talked about the times you were there. There were
8 different tidal times at each of your visits, were there not?

9 A. Correct.

10 Q. All right. And let's get now to the 19th. The Judge
11 wants us to move along; I want to move along. On the 19th
12 you -- I believe you said you arrived at 5:45; is that
13 correct?

14 A. Roughly, yes, sir.

15 Q. Okay. And my calculations, and I'm going to ask you if
16 you know, were that sunrise that day would have been
17 somewhere around 7:20 a.m., does that sound right?

18 A. Sounds right, yes, sir.

19 Q. And, of course, the Court knows the law says you can't
20 start water fowl hunting until 30 minutes prior to sunrise?

21 A. Correct.

22 Q. And there are adjustments so I've calculated that
23 shooting time there, I ask if you agree, was around 6:50
24 a.m.?

25 A. No.

1 Q. 6:56, if you use 7:19? When was shooting time that day?

2 A. I'm not sure if I have -- well, let me see. Check my
3 notes real quick. It would have been, that's correct, the
4 6:50. The first shot was at 6:56, and it was -- it was
5 shooting hours at the first shot.

6 Q. No issues with the timing of the shots there, correct?

7 A. Correct.

8 Q. I've tried to find the tide chart for a year ago, and it
9 appeared to me that low tide on Gordon's Creek where you were
10 that morning was around 5:10 a.m. Would that be consistent
11 with your observations?

12 MS. STERLING: Your Honor, I'm going to object to
13 the testimony by counsel. I don't know that he -- that
14 certainly wasn't brought up in direct. I don't know that
15 he's acknowledged --

16 THE COURT: If you could just ask the question, I
17 think --

18 BY MR. ROBERTS:

19 Q. Do you know when low tide was at the site where you found
20 Mr. Childers' son and Mr. Hodge that morning?

21 A. Where the tide was?

22 Q. No. When was low tide, if you know?

23 A. I'm not sure of the time.

24 Q. Okay. Well, what you saw when you walked down to the
25 creek that morning, did it appear the tide was coming in or

1 going out?

2 A. It would have been coming in.

3 Q. Coming in. So low tide was prior to that, obviously,
4 right?

5 A. Correct.

6 Q. Okay. You've also testified on direct that it was
7 unusual, you thought, that there were no decoys put out,
8 correct?

9 A. Correct.

10 Q. All right. If you're hunting a roost, you would scare or
11 get up the ducks if you went out and threw out decoys; isn't
12 that true?

13 A. I've never hunted a roost so I would not know.

14 Q. Well, think about it. A roost is a place where --

15 MS. STERLING: Your Honor, he said he does not
16 know. I'd ask that he --

17 THE COURT: Well, I think based on his expertise,
18 it's a fair cross-examination. I'll allow it. But, again,
19 ask questions.

20 MR. ROBERTS: Yes.

21 BY MR. ROBERTS:

22 Q. A roost is a place where they are sleeping overnight,
23 right?

24 A. Right.

25 Q. You're just waiting there for them to wake up and fly,

1 correct?

2 A. Correct.

3 Q. Isn't it true that if you were out there splashing around
4 throwing out decoys, you would disturb them, they would fly
5 away?

6 A. Correct.

7 Q. So it would not be unusual to not use decoys if you were
8 hunting a roost, correct?

9 A. Right.

10 Q. Isn't it true that if you jump shoot, which we've
11 discussed --

12 MS. STERLING: Your Honor, I'm going to object.
13 Again, you're not talking about anything related to the
14 facts of the case in this particular line of questioning.
15 He's also indicated that he does not know about jump
16 shooting.

17 THE COURT: Yeah. We are not -- there is no issue
18 regarding jump shooting in this case.

19 MR. ROBERTS: Here is the only -- I agree with you,
20 Judge, but here's the issue. He said on direct examination,
21 and I believe that it's pretty important, that if you don't
22 put out decoys, that's unusual. He said that as a warden
23 and as a duck hunter, it's unusual that you don't put out
24 decoys. He said there were no decoys.

25 I was just trying to determine that he may have

1 missed a couple of places or opportunities for duck hunting,
2 even if we weren't jump shooting, where it wasn't unusual.
3 I think it's proper cross.

4 THE COURT: All right. Let's move through it
5 quickly.

6 BY MR. ROBERTS:

7 Q. You don't use decoys when you jump shoot ducks, do you?

8 A. No, sir.

9 Q. So that's not unusual, right?

10 A. Correct.

11 Q. All right. Let's talk about your interaction with
12 Mr. Childers and the other two hunters. The first one you
13 saw was his son, he's up in the woods doing what he's doing,
14 correct?

15 A. (No audible response).

16 Q. Prior to that time were you able to determine the faces
17 or identities of the individuals down there?

18 A. I could see that just those three individuals down there
19 from --

20 Q. It's too dark, wasn't it --

21 A. -- from my vantage point.

22 Q. -- right?

23 A. Correct.

24 Q. It was too dark when they arrived, which you've indicated
25 the timing that they arrived --

1 A. Correct.

2 Q. -- to see who they were or what -- even what gender they
3 were, correct?

4 A. Correct.

5 Q. And it would be too dark to see what was in or on the
6 surface of the water at that time, correct?

7 A. They had several flash -- the boat had a light on it.

8 Q. Without a light, you couldn't see anything?

9 A. Correct. You would not be able to see.

10 Q. All right. Once the boat was parked at the trees, you
11 indicated --

12 A. Yes, sir.

13 Q. -- did anyone return to the boat where you later saw this
14 concentration of Milo?

15 A. Not until myself and Mr. Childers walked back to the --

16 Q. Right. So the point is, the boat would have been parked
17 in the dark and would not have been returned to while it was
18 dark, correct?

19 A. Right.

20 Q. All right. You said, I think, that the duck split -- and
21 I don't know, either, but the duck split that year was from
22 December 2nd to the 19th, I think, correct?

23 A. I believe so.

24 Q. So that means that there was a period of time prior to
25 the 2nd where there was a -- over the Thanksgiving holiday,

1 there was duck hunting allowed?

2 A. Correct.

3 Q. And then it's closed, and then it would reopen till
4 unusually the end of January?

5 A. Yes, sir.

6 Q. So you don't know what was going on in terms of feeding
7 or baiting or anything on that creek during that split,
8 correct?

9 A. No, sir.

10 Q. You don't know?

11 A. The only thing during -- during that split when he was
12 out prior to the 22nd, I don't know what was going on that
13 creek.

14 Q. Right. Okay. I think you said on direct exam that you
15 did, you and Officer Joyce did a compliance check, correct?

16 A. Correct.

17 Q. In case His Honor doesn't know, what are the things that
18 a game warden looks for from a duck hunter when you do a
19 compliance check?

20 A. State home residence.

21 Q. That was okay, correct?

22 A. On Mr. Childers and his son, yes.

23 Q. I'm talking about this man.

24 A. Okay. State high license, state stamp, federal duck
25 stamp.

1 Q. That was okay, correct?

2 A. Yes, sir. What type of shotgun for a plug and --

3 Q. Was that okay?

4 A. You'd have to ask Officer Joyce, he checked weapons, but
5 in our report I did put that it was --

6 Q. Okay.

7 A. They were all in compliance.

8 Q. What else?

9 A. Shells for lead shot.

10 Q. No problem there?

11 A. No, sir.

12 Q. The fact that it was in season?

13 A. Is in season?

14 Q. The fact that the gauge on the gun was correct?

15 A. Correct.

16 Q. In fact, there weren't any live decoys used, right?

17 A. Right.

18 Q. All those -- all right, sir. Now, duck hunting as a
19 sport requires a lot of preparation; is that a fair
20 statement?

21 A. Absolutely.

22 Q. All right. And just quickly I'm going to take you
23 through, you're going to have to have -- make sure the
24 boat --

25 MS. STERLING: Your Honor, I'm going to object to

1 the relevance of this. Again, I don't see how this is
2 leading us anywhere based on the direct examination.

3 THE COURT: Where are we going with this,
4 Mr. Roberts?

5 MR. ROBERTS: Well, I don't know what you know
6 about duck hunting, Judge. I was going to try and point out
7 from the expert and the officer all the time and investment
8 that's put into a duck hunt, a particular duck hunt, which
9 includes scouting. You may recall there's testimony that my
10 client was seen on the lot prior to the day that they met
11 him.

12 THE COURT: All right. Well, let's ask about the
13 scouting, then. What about that?

14 BY MR. ROBERTS:

15 Q. All right. After you do all the other stuff and pay all
16 the other money, one of the things you want to do is know if
17 there are any ducks out there, correct --

18 A. Right.

19 Q. -- right? Because you don't want to sit there and do
20 nothing?

21 A. Right.

22 Q. And scouting can include going to a place you intend to
23 hunt and staying there for a while to see if water fowl are
24 about, right?

25 A. Correct.

1 Q. All right. And so you could describe the visit of
2 Mr. Childers, which you've testified to --

3 MS. STERLING: Objection. This calls for
4 speculation, Your Honor.

5 MR. ROBERTS: Well, I don't --

6 THE COURT: Why don't you just ask him a question
7 rather than could.

8 BY MR. ROBERTS:

9 Q. December 27th is a scouting trip, right?

10 MS. STERLING: Objection again, Your Honor.

11 THE COURT: Rephrase the question. Do you have any
12 knowledge whether, when you saw Mr. Childers and his son on
13 December 27th, they were scouting?

14 THE WITNESS: I may not watch for that.

15 THE COURT: Thank you.

16 BY MR. ROBERTS:

17 Q. And he has no knowledge they weren't, either, correct?
18 Is that correct?

19 A. Correct.

20 MR. ROBERTS: Thank you, Your Honor. Judge, may I
21 have just a second?

22 THE COURT: You may.

23 BY MR. ROBERTS:

24 Q. Now, to the sharp point of the stick here, Officer, you
25 questioned my client after you did the safety and the

1 compliance check and got him away from the site, correct?

2 A. Correct.

3 Q. All right. And he made a statement about the bait,
4 correct?

5 A. Correct.

6 Q. And tell us again what that statement was.

7 A. Mr. Childers stating that the individual that put the
8 bait out was not hunting with him. I questioned Mr. Childers
9 about the name of that individual that placed the bait, but
10 he did not want to give out any names. Mr. Childers made the
11 acknowledgement that he knew bait was there but made a
12 comment that since he did not put the bait out, that he was
13 good to hunt the area.

14 Q. And your report, you're quoting that verbatim, how long
15 after the incident was this report prepared?

16 A. That would have been -- I don't have an exact date on
17 when it was --

18 Q. Well, no, I didn't ask you for the -- how long? A day, a
19 month, a week, two weeks?

20 A. The report was probably written somewhere up there
21 probably a couple weeks, but --

22 Q. Did you make notes of Mr. Childers' statements --

23 A. I did.

24 Q. -- that day?

25 A. I did.

1 Q. You did. Do you recall that he said that he knew an area
2 on Gordon Creek was baited during the split instead of the
3 area where he was standing was baited?

4 A. I do not recall that.

5 Q. You don't recall that. So he could have said that and
6 you just don't recall, correct?

7 A. Correct.

8 Q. And do you recall him mentioning Jolly Pond, which we've
9 already exhausted ad nauseam, is up at the head of the creek?

10 A. He made no knowledge to me about Jolly Pond.

11 Q. Okay. In fact, he said he didn't know where the
12 individual was who might have baited this, correct?

13 A. Correct. I asked Mr. Childers did that individual that
14 put the bait out was not hunting with them, and he did refuse
15 to give the name of that individual that placed the bait out.

16 Q. Well, my final question, then, would be, Officer Howlett,
17 thank you for your patience, if Mr. Hitchens -- again, I'm
18 looking at our map, which would be Government's Exhibit 1,
19 Mr. Hitchens, who owns all this shoreline I'm outlining; is
20 that correct?

21 A. Correct.

22 Q. If Mr. Hitchens had put food out from his lot to the BB's
23 Dust --

24 MS. STERLING: Your Honor, calls for speculation,
25 and there is no foundation.

1 MR. ROBERTS: He said the people feed the ducks
2 along the creek, Judge.

3 THE COURT: I'm going to sustain the objection.

4 MR. ROBERTS: Thank you for your candor, Officer.

5 REDIRECT EXAMINATION

6 BY MS. STERLING:

7 Q. Mr. Howlett, first, with regard to all of these hunt
8 clubs, the Powhatan Club and all those that you mentioned in
9 response to Mr. Roberts' questions, those are all beneath
10 where the dock is, where you found --

11 A. Correct. They would all --

12 Q. -- is that correct?

13 A. -- be out towards the mouth.

14 Q. Towards the mouth. And there are lots of them where
15 people can duck hunt in blinds, correct?

16 A. Correct.

17 Q. Did you have any conversation with or knowledge as to
18 whether Mr. Childers was involved in these hunt clubs?

19 A. I believe Mr. Childers was a member of Pinewood Hunt
20 Club, a current member, and the other individual in question
21 was a member of the Paradise Hunt Club.

22 Q. So it would have been possible to hunt at these hunt
23 clubs using blinds and that is common in the Gordon Creek
24 area --

25 A. Correct.

1 Q. -- by your testimony?

2 Okay. Did Mr. Childers indicate to you that he was
3 familiar with the area, the Gordon Creek area?

4 A. Not directly, but he had stated that he had been in that
5 area before.

6 Q. Okay. Well, if you participate in the hunt club, that
7 would indicate that he was familiar, correct?

8 A. Correct.

9 Q. Okay. And did he also indicate to you his history as a
10 duck hunter, whether he was experienced or for how long a
11 period of time he might have been a hunter?

12 A. He did not make any direct comment on how long he had
13 been a hunter.

14 Q. Do you happen to know from your investigation?

15 A. Into the '90s, I believe, through investigation.

16 Q. Okay. All right. So it has been some period of time,
17 correct?

18 A. Correct.

19 Q. And you indicated in response to Mr. Roberts' question
20 that Gordon Creek was a popular place to hunt if you have a
21 blind, correct?

22 A. Correct.

23 Q. And have you ever seen any other type of hunting;
24 floating blinds, jump shooting, people shooting from the
25 shore? Have you ever seen that before?

1 A. I've seen some of the club members will hunt out of a
2 blind, a floating blind.

3 Q. Okay.

4 A. But for the majority as law enforcement, they are hunting
5 out of stationary blind.

6 Q. Okay. All right. And the way the pond -- the water flow
7 is from the pond into the bay, does it not?

8 A. It would -- from Jolly Pond?

9 Q. Jolly Pond.

10 A. It would flow down past -- I mean, the headwater would
11 start, in looking at the map, just, you know, north of where
12 it goes off the paper.

13 Q. Right.

14 A. Jolly Pond would be north of that, but it would all be
15 flowing down.

16 Q. So, correct me if I'm wrong, would you expect, if there
17 was something placed in the water, Milo or anything else
18 south of where the spot where you contacted Mr. Childers,
19 would that be going up towards the area? Would water be
20 flowing, carrying anything from the bay up into Jolly Pond?

21 A. Not up into Jolly Pond from the bay, no. I mean, it
22 would have to go up over the spillway.

23 Q. Right. So, and, again, the hunt clubs are all south of
24 the spot where you came in contact --

25 A. Correct.

1 Q. And are there hunt clubs north of that, to your
2 knowledge?

3 A. There is some deer hunting clubs up north that I'm aware
4 of, yes.

5 Q. Okay. And you indicate on cross that residents along the
6 creek north of the spot where you came in contact with
7 Mr. Childers might have fed ducks; is that correct?

8 A. Correct.

9 Q. And what -- what would that involve? Would you happen to
10 know?

11 A. When I spoke to Mr. Hitchens, he stated that he did feed
12 ducks but it was just off of his dock, right down off of his
13 shoreline by his house.

14 Q. Would you expect to find the quantity of corn and Milo
15 that you found at the location where you came in contact with
16 Mr. Childers --

17 A. No, ma'am.

18 MR. ROBERTS: Judge --

19 MS. STERLING: Let me just ask the question before
20 anybody --

21 BY MS. STERLING:

22 Q. -- in an area where people were feeding ducks?

23 A. No.

24 Q. All right. I'm sorry. Go ahead.

25 MR. ROBERTS: I don't think he's been qualified as

1 an expert in hydrology or stream geography or biology,
2 Judge. That's a very damaging -- that's an opinion. I
3 object to his opinion testimony.

4 THE COURT: Are you an expert in hydrology?

5 THE WITNESS: I have a class one waterworks state
6 license, if that means anything. I worked at a surface
7 water treatment plant for six and a half years for the City
8 of Williamsburg.

9 THE COURT: I think hydrology has to do with are
10 you an expert in --

11 THE WITNESS: But, no, I'm not in hydrology, not in
12 flow of water, no.

13 THE COURT: All right. Thank you.

14 BY MS. STERLING:

15 Q. Well, I'm asking, then, about your experience as far as
16 people putting out duck -- food to --

17 A. The quantity that would be placed out by an individual,
18 in my opinion --

19 Q. Or your experience?

20 A. -- or my experience would not be the quantity that was
21 found at the site.

22 Q. Okay. Now, Mr. Roberts described to you a roost,
23 correct?

24 A. Correct.

25 Q. On the times that you came to this area on December the

1 23rd, again on the 26th, on the 18th of January and the 19th,
2 did you believe that those birds were roosting?

3 A. According to my times, on the 23rd was at 11:00 in the
4 afternoon, so that would not be a roost time that the birds
5 would have jumped up.

6 Q. What does a roost time mean?

7 A. It, essentially, is in the evening right before dark, the
8 birds will go to roost.

9 Q. Right.

10 A. And then typically in the morning at first light, they
11 will come out of their roost to go feed.

12 Q. Okay. So tell us -- okay. You said on the first
13 occasion on the 23rd of December --

14 A. The 23rd was at 11:00 in the afternoon, the 26th was at
15 7:30 in the morning. The 26th we also returned back at 1523.

16 THE COURT: Were either of those roost times?

17 THE WITNESS: No.

18 BY MS. STERLING:

19 Q. Okay. And when you came down on the 19th, and you said
20 that you arrived there about 5:45. You were there at
21 sunrise. Did you see the birds come out from a roost?

22 A. I only saw the birds come out right as the boat was
23 coming up into the water, which jumped all the birds out that
24 morning.

25 Q. Okay. And that wasn't surprising to you?

1 A. No.

2 THE COURT: Say that again. I'm sorry. Give me --

3 THE WITNESS: When the boat with the mud motor on
4 the back, which is a pretty loud motor, came up the creek to
5 where I was at where they dropped the hunters off, the
6 approximate that they got to the shoreline caused the geese
7 and the birds to all jump up and fly out of the area.

8 THE COURT: All right. Thank you.

9 BY MS. STERLING:

10 Q. Okay. And there was no impoundment or flooded field from
11 which these grains could have come from, correct?

12 A. Not to my knowledge.

13 Q. No agricultural runoff missing?

14 A. Not to my knowledge, no.

15 Q. And each time that you went down to the area on these
16 different occasions, it was clear to you that there was
17 grain, corn and Milo in the water, that was clear to the
18 naked eye, correct?

19 A. Correct.

20 Q. Okay. And that was clear to -- including on the 18th,
21 the day before you came --

22 A. Correct.

23 Q. Okay. All right. Okay. You indicated that the boat, it
24 was dark when you saw the boat on the 19th but it did have
25 lights?

1 A. Correct.

2 Q. And could those have been used to survey the water area
3 or the area to determine whether bait was out there?

4 A. They could have, yes.

5 Q. And is that a normal practice? I mean, do -- let me ask
6 you the question, when you're duck hunting, do you normally
7 go out before sunrise to get yourself situated?

8 A. Correct.

9 Q. And would you bring lights so that you could see the area
10 around you? Would that be a --

11 A. Normally, you only have a flashlight or something of that
12 nature to where you could see what you were doing.

13 Q. And in this case the boat had its own light, correct?

14 A. The boat had a light on the front, yes, ma'am.

15 Q. And then, finally, you indicated that you -- that you
16 prepared your report from notes, and the statement of
17 Mr. Childers, did you make notes of that or a note of that at
18 the time that it was made from which you subsequently
19 prepared your report?

20 A. I made a note of when the bait was present at that
21 setting there on the 19th at 2:56 in the afternoon.

22 Q. Okay.

23 A. So that would have been the day of.

24 Q. But did you make a note about the exact nature of his
25 statement to you about the baiting?

1 A. That was the only -- on the 19th at 2:56 where I made an
2 actual note in our CAD system on our computer of what the
3 statement was.

4 Q. In your computer. So you maintained that --

5 A. Correct.

6 Q. -- and used that when you prepared your report?

7 A. Correct.

8 MS. STERLING: Okay. Thank you very much.

9 THE COURT: Recross, quickly.

10 MR. ROBERTS: Four or five.

11 RECROSS-EXAMINATION

12 BY MR. ROBERTS:

13 Q. I think you said when you were confronted with my client
14 about the bait, he had a flabbergasted look on his face; is
15 that correct?

16 A. Correct.

17 Q. He was surprised?

18 A. Correct.

19 Q. All right. You talk about, and Ms. Sterling talked
20 about, the fact that nothing could flow up to Jolly Pond up
21 the creek. And you answered that's correct because there is
22 a dam, correct?

23 A. Correct.

24 Q. But things could flow when the tide turns and the wind is
25 right, right up to the base of the dam, could they not?

1 A. They could.

2 Q. This isn't a stream like a trout stream where there is a
3 constant flow in one direction; isn't that true?

4 A. Right, it's tidal.

5 Q. All right. So it's possible that things flow up and down
6 all the way to the dam on Jolly Pond?

7 A. It's possible, yes.

8 Q. Which you said was seven miles above where you found my
9 client?

10 A. Correct.

11 Q. All right. The Judge asked you about roost times for
12 your visit. There is no chart or book or any way to
13 determine what a roost time is, is there?

14 A. There is, no.

15 Q. No. And some birds leave in the morning and never come
16 back until dark and some come back in the middle of the day
17 after feeding in the field, and some stay all day long,
18 correct?

19 A. Correct.

20 Q. Ms. Sterling asked you about the possibility of
21 agricultural runoff on Gordon Creek. I think you said on
22 cross you've never been from the dam, other than looking off
23 the dam, to the point where you saw Mr. Childers, you never
24 visited that area at all, have you?

25 A. I'm familiar with the area but I've never physically set

1 foot on it.

2 Q. All right. So there could be a little garden patch or a
3 farm up there, right?

4 A. Not to my knowledge, there isn't.

5 Q. I understand not to your knowledge. My question is, you
6 said there is not agriculture --

7 A. Right.

8 Q. -- below the dam to the point you met, and you don't know
9 whether there is or not, do you?

10 A. Correct.

11 Q. Now, the last point. I said five. You talk about the
12 running lights or the lights on the boat. You're talking
13 about the red and green light on the bow to comply with
14 safety regulations, aren't you?

15 A. The light bar on the front of the bar.

16 Q. Right. And that's a red and green light?

17 A. Well, you have your bow light but there are also -- there
18 was also a -- a white -- a white bar on the front of the
19 boat.

20 Q. And that was on?

21 A. When they came up the creek, it was on.

22 Q. Did it turn off as they got to the place where the
23 hunters were dropped?

24 A. No. The hunters were dropped, it was turned off.

25 Q. So you couldn't see where -- what was going on where the

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1 boat was parked, correct?

2 A. I couldn't move --

3 Q. If you're on the boat, you couldn't see because the light
4 bulb was off?

5 A. Right.

6 MR. ROBERTS: All right. Thank you, Officer.
7 That's all the questions.

8 MS. STERLING: Be very brief.

9 REDIRECT EXAMINATION

10 BY MS. STERLING:

11 Q. Officer Howlett, you're familiar with the Gordon Creek
12 area, correct?

13 A. Correct.

14 Q. It's not an area where farming is conducted, correct?

15 A. You mean the immediate area where this was at, no.

16 Q. Okay. And is it -- is there any area of the Gordon Creek
17 area where you know of where there could -- the farming is
18 going on?

19 A. Further down towards Nayses Bay, there is.

20 Q. Not farther up?

21 A. No.

22 Q. Okay. And, finally, the question of roosting, your
23 testimony is that the birds flying up occurs at approximately
24 sunrise and sunset, correct?

25 A. Typically, yes.

1 MS. STERLING: Thank you.

2 THE COURT: All right. Let's hand me those
3 pictures. I want to make sure we deal with the evidence
4 before we finish with Officer Howlett.

5 MR. ROBERTS: Judge, I remove any objections to the
6 pictures.

7 THE COURT: I understand. I just want to clarify.
8 Thank you for notifying me of that.

9 MR. ROBERTS: If it please the Court, I have
10 Government 1 as the map.

11 THE COURT: Yeah. I'm going to go right through
12 it. So we will deal with this now. 1 is the map, that's
13 correct. I'm looking at Exhibit 5 which purports to show
14 seed in the water along with what looks like dead marsh
15 grass. I'm holding it up.

16 THE WITNESS: Yes, sir.

17 THE COURT: When was this picture taken?

18 THE WITNESS: That was taken on the 19th, sir.

19 THE COURT: Government's Exhibit 5 will be
20 admitted.

21 (The document was received in evidence as
22 Government's Exhibit No. 5.)

23 THE COURT: Government's Exhibit 2, when was this
24 taken? I'm showing it to you. It also shows what appears
25 to be corn and reflection on top of the water. Was this

1 taken December 23rd?

2 THE WITNESS: December 23rd, 2018, Your Honor.

3 THE COURT: All right. That will be admitted.

4 (The document was received in evidence as
5 Government's Exhibit No. 2.)

6 THE COURT: Government's Exhibit 1, the map will be
7 admitted.

8 (The document was received in evidence as
9 Government's Exhibit No. 1.)

10 THE COURT: Government's Exhibit 3 is the log that
11 purports to show seed on it. That was taken on January
12 18th; is that correct?

13 THE WITNESS: Correct, Your Honor.

14 THE COURT: That will be admitted.

15 (The document was received in evidence as
16 Government's Exhibit No. 3.)

17 THE COURT: Government's Exhibit 4 is the picture
18 of the water with the two trees in the background.

19 THE WITNESS: January 19th.

20 THE COURT: January 19th. Are you saying you saw
21 the hunters in this area from the -- between you, holding
22 the camera, and those two trees or somewhere else?

23 THE WITNESS: They were hunting, from where I was
24 standing taking that picture, they would have been standing
25 to my back. Where the boat was parked, Mr. Childers would

1 have walked across that swamp or the marsh there -- where
2 the mud is, to get to the other hunters where he had dropped
3 them off.

4 THE COURT: You are saying the boat was parked
5 behind the two trees?

6 THE WITNESS: Correct.

7 THE COURT: And the hunters were behind where you
8 were taking this picture?

9 THE WITNESS: Correct.

10 THE COURT: That is Government's Exhibit 4. That
11 will be received into evidence.

12 (The document was received in evidence as
13 Government's Exhibit No. 4.)

14 THE COURT: Exhibit 5 is the Milo seed that's
15 already in evidence. No, I'm sorry. That's 6. Exhibit 5
16 was the -- I already dealt with that. That's the Milo seed
17 that was shown on January 19th.

18 Exhibit 6 is the actual Milo seed samples. Did you
19 collect these on the date in question?

20 THE WITNESS: Correct.

21 THE COURT: And were they in the water?

22 THE WITNESS: They were in the water, yes, sir.

23 THE COURT: And 7 is the birds. That's already in
24 evidence.

25 I had a question or two for you. Let me just find

1 them. So I didn't understand fully your testimony about
2 where you saw Milo seed that you referred to being at the
3 base of someone's feet. Was that in the boat, was it
4 outside the boat? Where were you referring to?

5 THE WITNESS: When the boat was parked right next
6 to those two trees, I was standing on -- right at the
7 baseline of the water. Mr. Childers was inside the boat. I
8 could look down at the water and see Milo right at where the
9 water, shoreline was at, essentially.

10 THE COURT: And did you see any other kind of bait
11 inside the boat itself?

12 THE WITNESS: Not inside the boat, no.

13 THE COURT: Officer, those were the only questions
14 I had. You may step down.

15 (Witness excused.)

16 THE COURT: If we could, we've got the prior
17 Mrs. Faircloth, I believe, here. I'd like to deal with the
18 matter concerning her. Mr. Cole, Ms. McCaslin, if you
19 can -- we will take a brief recess on Mr. Childers' case to
20 deal with that.

21 (Recess from 11:54 a.m. to 12:21 p.m.)

22 THE COURT: Are you ready with your next witness?

23 MS. STERLING: Yes, Your Honor. Your Honor, I do
24 have another conservation officer, Officer Joyce is here.
25 But I think what he would testify to has pretty much been

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1 covered by Officer Howlett, so I'm going to call -- I'm
2 going to ask that he remain, Officer Joyce, but I would call
3 the federal officer, Officer Mena.

4 THE COURT: Very well.

5 MS. STERLING: In the interest of moving things
6 along.

7 THE COURT: If you would come forward, sir, and be
8 sworn.

9 (Witness was sworn.)

10 CHRISTOPHER LEE MENA, called by the Government,
11 having been first duly sworn, was examined and testified as
12 follows:

13 DIRECT EXAMINATION

14 BY MS. STERLING:

15 Q. Please state your name for the Court, sir.

16 A. It's Christopher Lee Mena.

17 Q. And how are you employed?

18 A. I'm a special agent with the United States Fish and
19 Wildlife Service.

20 Q. And what do your duties entail?

21 A. Enforcement of federal wildlife laws, including the
22 Migratory Bird Treaty Act.

23 Q. And how long have you been a federal wildlife officer?

24 A. I started my employment with the Fish and Wildlife
25 Service in August of 2011.

1 Q. And as you indicated, part of your duties are enforcement
2 of Migratory Bird Treaty Act, correct, and regulations
3 promulgated thereto?

4 A. Yes, ma'am.

5 Q. And that includes ducks?

6 A. Yes, ma'am. Migratory birds are classified as ducks,
7 geese and gallinules.

8 Q. And in your capacity as a federal officer, did you become
9 involved in late December 2018/early January 2019 in
10 investigation of a baiting incident at Gordon Creek and James
11 City County --

12 A. Yes, ma'am.

13 Q. -- in Virginia?

14 And that's -- that location is in the Eastern
15 District of Virginia; is that correct?

16 A. It's James City County within the Eastern District, yes,
17 ma'am.

18 Q. And how did you become involved in that investigation?

19 A. Officer Zach Howlett contacted me after investigating a
20 baiting case and contacting individuals there hunting while
21 in the presence of bait.

22 Q. And what did you hear after you were contacted by Officer
23 Howlett?

24 A. I reviewed the evidence that Officer Howlett collected,
25 along with discussing the case with him, Officer Howlett and

1 myself interviewed a Mr. Larry Childers about his involvement
2 in hunting that area on January 19th.

3 Q. And why is it that Mr. Howlett came to you as a federal
4 officer in this particular case?

5 A. Migratory birds are protected by both federal and state
6 law. Generally, with the Fish and Wildlife Service and the
7 Virginia Department of Game and Inland Fisheries, they will
8 bring all of their cases to us to review to see if they are
9 appropriate for federal prosecution, if the ticket is not
10 issued in the field for a state violation.

11 Q. Correct. So, then, it wouldn't be unusual for someone to
12 be investigated and be told we are not issuing you a ticket
13 right now because we are consulting with the federal
14 agencies?

15 A. No, ma'am. I, myself, don't issue tickets in the field
16 at all.

17 Q. Okay. And so when was it that Officer Howlett first
18 contacted you?

19 A. It was on or about January 21st.

20 Q. And when you say reviewed his evidence, what did that
21 include?

22 A. He presented me with photographs of the area, an overview
23 map of the area the hunters were located. He also provided a
24 bait sample of bait that was collected at the time of his
25 inspection of the hunters, and then we discussed his notes

1 and what his field contact was with Mr. Childers and the two
2 other hunters there.

3 Q. Okay. And specifically what you were reviewing were his
4 items related to his investigation of the baiting incident
5 that he observed on the 19th of January, correct?

6 A. Yes, ma'am, that specific -- the bait he found and the
7 issue surrounding the hunting of that area.

8 Q. Okay. So you indicated that you spoke with Mr. Larry
9 Childers; is that correct?

10 A. Yes, ma'am, on February 5th.

11 Q. Of 2019?

12 A. Yes, ma'am.

13 Q. And do you see him here today?

14 A. I do. He is --

15 MR. ROBERTS: We will stipulate.

16 THE COURT: For the record, he's identified the
17 defendant. The defense has stipulated. Thank you.

18 BY MS. STERLING:

19 Q. Where and when did you come in contact with Mr. Childers?

20 A. We contacted Mr. Childers at his residence in Seaford.

21 Q. Okay. And that's Seaford, Virginia?

22 A. Yes, ma'am.

23 Q. And where is that located in relation to Williamsburg,
24 Virginia?

25 A. Approximately 30 minutes away.

1 Q. And where in Seaford did you come in contact with him?

2 A. At his residence. I have the address here in my notes.

3 Q. Okay.

4 MR. ROBERTS: Judge, if this is about *Miranda*,
5 we've got no issues with --

6 MS. STERLING: No. No. I'm going to move on.

7 BY MS. STERLING:

8 Q. So were you by yourself or were you with someone else
9 when you went to his residence?

10 A. Officer Howlett was with me.

11 Q. Okay. So when you went to the residence, how did you
12 come to speak to Mr. Childers? What occurred?

13 A. We knocked on the door -- approached his house, knocked
14 on the door several times. Mr. Childers -- no one answered
15 the door initially. We were walking away from his residence
16 and noticed a minivan sitting in the front driveway and a
17 large dump truck.

18 While we were sitting at the road, Mr. Childers and
19 someone he identified as his wife exited the property, and we
20 walked up to them and spoke to them in the driveway of his
21 residence.

22 Q. Okay. And did you know it was Mr. Childers or was
23 Mr. Howlett able to identify him?

24 A. Mr. Howlett was able to identify him, and then through
25 conversation he identified himself as Larry Childers.

1 Q. And did you identify yourself?

2 A. I did, yes, ma'am.

3 Q. And did you have a conversation with Mr. Childers about
4 the events of January the 19th?

5 A. We did, yes, ma'am.

6 Q. Okay. Can you tell us about that conversation, please.

7 A. We initially asked Mr. Childers about the incident.

8 Mr. Childers stated that he did, in fact, hunt the area in
9 Gordon's Creek, that Officer Howlett identified to me in
10 his -- the review map that he had provided me.

11 Q. Was that on the date in question on January --

12 A. January 19th, yes, ma'am.

13 Q. Did he indicate he had hunted at any other time?

14 A. Yes, ma'am. He said that he had hunted the general area
15 in several times prior to that.

16 Q. Okay. Go ahead.

17 A. When asked about the incident, Mr. Childers stated that
18 he was aware that someone had put bait out in the area during
19 the split in the season. So the split -- hunting season
20 runs, and right now it's closed from December 1 to December
21 19th, and that's what is often referred to as the split. So
22 it's an open hunting season, a closed portion, and then it
23 opens back up.

24 Q. Is that just for migratory game birds?

25 A. That is just the migratory game birds for the season.

1 Q. So the split would have been --

2 A. The closed --

3 Q. -- somewhere around the first three weeks of December,
4 correct?

5 A. Yes, ma'am.

6 Q. Okay. Go ahead.

7 A. So Mr. Childers stated that he was aware that an
8 individual had placed bait in the area. When I asked him who
9 the individual was, he said that he would not provide the
10 name of the individual that placed the bait. I also asked
11 Mr. Childers if he -- the morning of the hunt if he did
12 anything to inspect the area prior to hunting for the
13 presence of bait. Mr. Childers stated he did not.

14 We further discussed it, and I asked him did he --
15 was the area able to be inspected had he chose to, and he
16 said, yes, that the area was about 20 to 30 yards wide, that
17 a boat could easily pass between the banks, and it would have
18 been easily inspected but he chose not to.

19 Q. Okay. And as far as the Westport area, the area where
20 this had occurred, did you ask him how he came to be there?

21 A. He told us that at the date that he traveled there by
22 boat to hunt on the 19th.

23 Q. Okay. Did -- was this -- what type of an area was it?
24 Was it a --

25 A. It's a large area, so there's a channel of the creek that

1 Gordon's Creek that runs through, and then the area is banked
2 by a marsh, a low round marsh.

3 Q. Do you know whose property it was?

4 A. I do not know whose it was. I was involved with the
5 interview of a Tommy Hitchens who said that it was not his
6 property.

7 Q. That's okay. Did you ask Mr. Childers or discuss with
8 him whether he had permission to be in that area?

9 A. I did. And Mr. Childers stated that it -- the property
10 he believed belonged to a Mr. Childers and that he had
11 permission from him, and we followed up and asked the
12 question, if it wasn't Mr. Childers' property, did you have
13 any permission to be on the property from anyone else, and he
14 said, no, he did not.

15 THE COURT: You said Childers twice. Did you mean
16 Mr. Hitchens?

17 MS. STERLING: Mr. Hitchens?

18 THE WITNESS: No. During the interview, Your
19 Honor, Mr. Childers stated that he was hunting on the
20 property on January 19th and that it was Mr. Hitchens'
21 property. We then asked Mr. Childers if it was not
22 Mr. Hitchens' property, did he have permission from anyone
23 else to be there, and he said no, Your Honor.

24 BY MS. STERLING:

25 Q. Okay. And he did admit to you to having shot migratory

1 game birds on the 19th in the area in question; is that
2 correct?

3 A. Yes, ma'am. He stated that he obviously had one
4 migratory game bird.

5 Q. Did you have any discussions with him about his prowess
6 or his hunting migratory game?

7 A. Yes, ma'am. He said he's been an avid hunter for 43
8 years and that he's been regularly traveling to Saskatchewan
9 and also hunting in Virginia.

10 Q. Okay. And you said, I believe, that he told you he had
11 hunted in the general area of Gordon Creek several times
12 before?

13 A. Yes, ma'am.

14 Q. Okay. Did you have any discussion with him regarding
15 hunt clubs on Gordon Creek?

16 A. Yes, ma'am. He said that he was a member of Pinewood
17 Hunt Club that had access to a boat launch near the area
18 which he was hunting. I further asked him if he was hunting
19 in the area as a member of the hunt club or a private
20 individual, and he stated that he was not hunting there as a
21 member of the hunt club, that he was hunting as a private
22 individual.

23 Q. Are you familiar with Pinewood Hunt Club?

24 A. I am not, ma'am.

25 Q. Okay. Did you ask him why he was not hunting at the hunt

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1 club?

2 A. I did not.

3 Q. Okay. All right. Thank you. And I want to show you
4 what's been marked as Government's Exhibit Number 8.

5 MR. ROBERTS: I'm going to object to the relevance
6 of this, but I guess --

7 THE COURT: Let's have him identify first --

8 MS. STERLING: Have him identify it.

9 THE WITNESS: Yes, ma'am. That's a photograph that
10 I took on February 5th, 2019. It depicts empty bags that
11 were labeled as shelled corn. They were observed in the
12 back of a minivan parked in the front of Mr. Childers'
13 residence.

14 BY MS. STERLING:

15 Q. Did you ask him about that?

16 A. I did. At the end of the interview I asked him about the
17 empty bags of corn, and he stated that there was nothing that
18 prevented him from feeding the ducks at the local pond.

19 MS. STERLING: Thank you. We move to introduce
20 Government's Exhibit Number 8.

21 THE COURT: Any objection?

22 MR. ROBERTS: Yes, sir. I object to the relevance.
23 If I understand Agent Mena's testimony, this interview
24 occurred on February the 5th, which would be 17 days after
25 the incident in a van that didn't belong to Mr. Childers. I

1 think it was identified as his wife's van. So I don't see
2 the relevance of the photograph or the statements about the
3 photograph, and I would object to their introduction.

4 THE COURT: The bags that you're referring to, are
5 they these green and red and tan --

6 THE WITNESS: Yes, sir. They are camouflaged bags.
7 There were multiple bags in the back, both visible there and
8 then down in the floorboard also, Your Honor.

9 THE COURT: You are saying it's shelled corn?

10 THE WITNESS: Yes, sir.

11 THE COURT: And the vehicle that they were in was
12 what?

13 THE WITNESS: It was a minivan parked in the
14 driveway of the residence, and we -- when we asked his --
15 him about them, his wife said that he was a hoarder and that
16 they were in the vehicle.

17 THE COURT: Do you know whose van it was?

18 THE WITNESS: I believe that Officer Howlett ran
19 the registration, and it came back to Mrs. Childers, but I'm
20 not a hundred percent certain if Mr. Childers was not also
21 on the registration. And, Your Honor, I did observe
22 Mr. Childers drive that van to the initial court appearance
23 last -- when we had the initial appearance in Newport News.

24 BY MS. STERLING:

25 Q. Do you happen to know --

1 THE COURT: Hold on, Ms. Sterling.

2 MS. STERLING: I'm sorry, Your Honor.

3 THE COURT: I'm going to overrule the objection and
4 admit Government's Exhibit 8 into evidence.

5 MS. STERLING: Okay. Thank you.

6 (The document was received in evidence as
7 Government's Exhibit No. 8.)

8 THE COURT: You may proceed.

9 MR. ROBERTS: Thank you, Your Honor.

10 BY MS. STERLING:

11 Q. One last question. The federal state laws and
12 regulations, what is their purpose?

13 A. The purpose is to not have an unfair advantage to the
14 hunter. Migratory birds migrate from Canada south, and
15 during their migration they are in search of habitat and food
16 to shelter during that migration. It's an unfair attractive.
17 Migratory birds are attracted to other birds feeding and also
18 to shelter.

19 What it creates is an area where a large number of
20 ducks would not normally congregate, and they don't shy away
21 from those areas even when hunted. You can often, when a
22 baited area is being hunted, will often observe birds being
23 shot at, fly away, and immediately return to the baited area.

24 Q. And are you familiar with the fact that the law has
25 changed over the years as far as --

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1 A. Yes, ma'am. We received training on that while in our
2 advance class at the Federal Law Enforcement Training Center.

3 Q. Okay. And the statute as it stands now in the regulation
4 on baiting state that the defendant -- or the person accused
5 of baiting knew or should have known that the area was
6 baited, correct?

7 A. Knew or reasonably should have known, yes, ma'am.

8 Q. Reasonably should have known. And it also specified, and
9 correct me if I'm wrong, I'm reading from the C.F.R.
10 20.11(j), the definition of baiting says that, "Any such area
11 will remain a baited area for ten days following the complete
12 removal of all such grain or other feed."

13 A. Yes, ma'am.

14 Q. And so what is the purpose of that?

15 A. The purpose of that is that the migratory birds will
16 often continue to return to an area, even though the bait has
17 been removed, thus creating that unfair advantage, again, to
18 the hunters. And it's a period of time to allow baiting area
19 to then be hunted legally once that grain or salt has been
20 removed and 10 days have been waited to be hunted.

21 Q. Okay. And when you say that the bait has been removed,
22 how would that be removed?

23 A. Either by a person or physically removing it or by ducks
24 or other wildlife consuming it.

25 Q. Okay. And so if a hunter were familiar with the fact

1 that there was grain in the area and/or that it was baited --

2 MR. ROBERTS: Judge, I think she's leading, just a
3 wee bit, the witness.

4 THE COURT: Well, let's hear the question first and
5 then we can decide whether there is an objection.

6 BY MS. STERLING:

7 Q. And in order to determine whether it was removed, you'd
8 have to go look, correct?

9 A. Yes, ma'am. You'd have to physically inspect an area to
10 determine whether it was baited or not.

11 MS. STERLING: That's my only question, Your Honor.
12 Thank you.

13 THE COURT: Cross-examination.

14 MR. ROBERTS: Yes, sir.

15 CROSS-EXAMINATION

16 BY MR. ROBERTS:

17 Q. Good afternoon.

18 A. Good afternoon.

19 Q. It's true, isn't it, that in your interview on February
20 the 5th Mr. Childers denied knowing there was bait in the
21 area where he was hunting, correct?

22 A. He denied knowing that there was bait on the day that he
23 hunted on January 19th, 2019.

24 Q. And, in fact, his discussion about baiting on that creek
25 indicated to you that he knew it was somewhere but not

1 necessarily the area where he was hunting, correct?

2 A. His statements were that he knew that someone had put
3 bait out on Gordon Creek in the area around where he was
4 hunting. Specifically, the specific spot where he was
5 hunting, I don't know.

6 Q. All right. Well, we've been provided with a CD of your
7 interview. You taped it, correct?

8 A. Yes, sir.

9 Q. My notes indicate this interview went on for 35 minutes,
10 according to what I was able to --

11 A. Yes, sir.

12 Q. Is that about right?

13 A. That's about right.

14 Q. At 1735 in the interview he admitted to knowledge of
15 someone in the area of baiting somewhere. If that is what
16 the tape said, that would be accurate, correct?

17 A. Correct.

18 Q. All right. And he rejected the accusation that he had
19 put the bait up, correct?

20 A. He said he knew who put the bait up but he would not
21 provide the name of the individual.

22 Q. Well, he said he did not put the bait up, correct?

23 A. Correct.

24 Q. Okay. Let's talk about the regulation and what's
25 considered a baited area. Officer Howlett has indicated the

1 last time that my client was seen in this area was on
2 December 27th. Are you aware of that, in reviewing his
3 report?

4 A. I am aware.

5 Q. And you have no knowledge to any other arrival or
6 presence of Mr. Childers other than the 27th prior to the
7 19th, correct?

8 A. No, sir.

9 Q. Okay. And so from -- assuming there was bait there on
10 the 27th, the -- it is long past the ten-day provision in the
11 regulation that the bait would still be expected to be there
12 on the 19th, correct, without putting more bait out?

13 A. I'm not understanding your question, sir.

14 Q. Well, the government wants us to believe that
15 Mr. Childers knew the bait was there on the 19th, correct?
16 If I was there on the 27th and saw bait and waited till the
17 19th of January, considering all the conditions on Gordon's
18 Creek, which include tidal area, muddy area, windy area,
19 water fowl there, it's reasonable to assume that it would be
20 gone by the 19th of January, isn't it?

21 A. It would be reasonable to assume it was gone but on the
22 19th there was a sample of bait --

23 Q. I understand that. I understand. Mr. Childers had no
24 problem agreeing to speak with you when you went to interview
25 him, correct?

1 A. No. He spoke with me.

2 Q. Now, you said you have been an agent since -- how long
3 has it been, excuse me?

4 A. August of 2011, and I've been a federal employee in this
5 line of work since January of 2001.

6 Q. How many baiting cases have you investigated in the
7 course of your career, do you know, roughly?

8 A. Be involved with total?

9 Q. Investigated.

10 A. 15, 20.

11 Q. All right. And have any of them ever been in regard to
12 bait on a tidal creek like Gordon Creek?

13 MS. STERLING: Objection to the relevance, Your
14 Honor.

15 THE COURT: Sustained.

16 BY MR. ROBERTS:

17 Q. Well, those baiting cases that you investigated before
18 this one, they involved fields, did they not?

19 A. Fields, swamps, and tidal creeks.

20 Q. And so you know, do you not, that the removal of the bait
21 called for in the regulation, the 10-day period where you
22 have to wait until it's removed before it is considered
23 unbaited, can occur in ways other than the ducks and someone
24 removing it, correct?

25 A. Correct.

1 Q. Well, you told Ms. Sterling there were two ways it could
2 be removed; either by the ducks eating it or by people.

3 There are other ways, correct?

4 A. Yes.

5 Q. And that includes the tide?

6 A. Yes, sir, the tide could remove it.

7 Q. The mud could remove it, it could sink where it wouldn't
8 be visible, correct?

9 A. Yes, sir.

10 Q. Wind could blow it if it was on the surface so that it
11 wouldn't be visible, correct?

12 A. Correct.

13 Q. And other animals other than water fowl consume these
14 types of bait as well, do they not?

15 A. Yes. I said wildlife.

16 MR. ROBERTS: Thank you, Officer. No further
17 questions.

18 THE COURT: Anything further?

19 MS. STERLING: No, Your Honor. Thank you.

20 THE COURT: Special Agent Mena, the regulation,
21 just to clarify to me, this 10 day, what does it specify?

22 THE WITNESS: Your Honor, it specifies that an area
23 shall remain baited until ten days after all of the feed and
24 grain has been removed.

25 THE COURT: So if an area is baited, it shall be

1 deemed to remain as such until 10 days after it has been
2 removed?

3 THE WITNESS: Yes, Your Honor. And in this
4 instance the bait was present the day of the hunt.

5 THE COURT: I understand that. Thank you. You may
6 step down.

7 THE WITNESS: Yes, sir.

8 MS. STERLING: Your Honor, I do have a copy of the
9 regulation if the Court would like to look at it.

10 THE COURT: Yes, please. If you will hand that to
11 the court security officer.

12 You may step down, Special Agent Mena.

13 THE WITNESS: Thank you.

14 (Witness excused.)

15 THE COURT: Any further witnesses for the
16 government?

17 MS. STERLING: No, Your Honor. That would be our
18 evidence.

19 THE COURT: All right. And are you resting?

20 MS. STERLING: Yes, we are. Thank you, Your Honor.

21 THE COURT: Very well.

22 All right.

23 MR. ROBERTS: The defense rests, if it please the
24 Court.

25 THE COURT: I'm sorry?

1 MR. ROBERTS: We rest.

2 THE COURT: Very well. No evidence from the
3 defense, then?

4 MR. ROBERTS: Not at this point.

5 THE COURT: Well, it's --

6 MR. ROBERTS: Well, if there is a sentencing event,
7 I would --

8 THE COURT: Understood. Okay. All right. I'll be
9 happy to hear any arguments you have. I don't know if you
10 want to advise the witnesses that they may reenter.

11 MS. STERLING: Oh. Shall I do that?

12 THE COURT: Jackie, would you mind just telling
13 them they are free to come back in the court.

14 MS. STERLING: Sorry, Your Honor.

15 THE COURT: Let me read this regulation while they
16 are doing that.

17 MS. STERLING: Yes, sir.

18 (Pause)

19 THE COURT: All right, Ms. Sterling. The
20 government has the burden of proof. I'll be happy to hear
21 any argument you have.

22 MS. STERLING: Thank you. Your Honor, Mr. Childers
23 is charged with taking or attempting to take migratory game
24 birds by the aid of baiting on or over any baited area where
25 a person knows or reasonably should know that there is or

1 has been baited.

2 The government would submit that the evidence in
3 this case is not only sufficient, it's absolutely
4 overwhelming. When Officer Howlett received information
5 about a baited area, he went out on December 23rd. He
6 checked out the scene. He noticed that there was bait in
7 the water. He took photos. He put up that surveillance
8 camera, obviously, with -- with these types of cases,
9 enforcement is a problem. We don't have enough officers to
10 cover all of the area, so they put up cameras. They see
11 through that camera during the period that they are up, that
12 it was Mr. Childers and just one other person who went down
13 there.

14 Mr. Childers went down on December 27th. He went
15 down from the edge of the property down to where the creek
16 is. Again, I think it's important to remember, this is not
17 an area where people are normally hunting because it's a
18 residential neighborhood. The lot which he had to cross
19 over to get there was owned by a private company. It was a,
20 presumably, a residential lot that had not yet been sold.
21 But they came in to the neighborhood. The neighborhood is
22 posted as no trespassing. So this is not an obvious place
23 that somebody would go to hunt.

24 You wouldn't just pick it, particularly because
25 Mr. Childers, by the testimony, is a member of a hunt club

1 farther down on Gordon Creek. There is no reason in the
2 world why he could have gone there. And so when Officer
3 Howlett is there on the 16th of December, and he sees the
4 bait that he said was clear to the naked eye, it is hard to
5 believe that on the 27th, the very next day when
6 Mr. Childers went down there, that he didn't see the same
7 thing.

8 It's not only hard to believe, it's impossible to
9 believe. I don't know what he was doing down there.
10 Mr. Roberts suggested he was scouting. Perhaps that is the
11 case. Since he came back, it seems quite logical that he
12 went down there to check it out. It's curious to the
13 government why he went there in the first place where he
14 could have gone someplace else. He could have gone to
15 this -- to a blind. He could have hunted somewhere else.
16 But he chooses to come into this park/residential
17 development and go down and look there.

18 Officer Howlett told the Court that they left the
19 cameras up for about 10 days. They didn't see -- there was
20 one other individual who was there other than Mr. Loss. So
21 it's not like a common hunting area that everybody in the
22 area is going to. It was unusual. In and of itself, it's
23 unusual for him to go down there to go hunting.

24 And when you look at the evidence, it's hard or
25 impossible not to conclude that the reason he is down there

1 is because he does know it's baited. He admitted when he
2 talked to Howlett and Officer Mena that he knew someone had
3 been baiting down there, someone had been baiting in Gordon
4 Creek.

5 He must have known it was that area because he
6 picked that area over the area where all the hunt clubs were
7 farther down the way. And even if you were to believe that
8 the grain was there because of a residence farther up the
9 creek or even farther down the creek were feeding ducks,
10 what Officer Howlett tells you is that feeding ducks, the
11 amount of grain that was in the area which he observed in
12 the area where the hunting occurred in December and January,
13 that amount of grain was inconsistent with runoff from
14 people who were feeding ducks.

15 So, again, it just seems overwhelmingly the case
16 that Mr. Childers knew it was being baited, and that's why
17 he showed up there. He would have seen it on the 27th
18 because the -- Officer Howlett saw on the 26th. After the
19 cameras were put up, Officer Howlett goes back on the 18th
20 of January, and he told the Court there was more out there,
21 and it looked like it had been replenished. So somebody is
22 looking at this area as an area that's good for duck hunting
23 because it is baited. Somebody is baiting the area.

24 And so Mr. Howlett sees nobody hunting on that day.
25 He just -- did take a bait sample, which we provided a

1 photograph of that to the Court. Then he goes back on the
2 19th and he goes back to this same area, and when he gets
3 there, again, you know, he tells the Court that it's
4 obviously baited. He says that when he stands next to the
5 boat that Mr. Childers came in on from farther down the
6 creek, he can see it, and it's very clearly there.

7 So it was no change between the 18th of January and
8 the 19th of January. It was clearly baited. And it had
9 been baited -- just had been baited in January just as it
10 had been at the end of December.

11 So if you look at the statute, it is inconceivable
12 that Mr. Childers either didn't know or should not have
13 known about the baiting. By his own statements he says he
14 knows the person who baited there. He told Officer Howlett
15 on the day in question, I didn't do the baiting so we should
16 be okay. But I know the person who put it out there but it
17 wasn't me. That is what he told Officer Howlett.

18 He didn't repeat that statement to Officer Mena,
19 but he did say, yes, I know the -- I know someone who is
20 baiting, you know, between the split. The fact that he
21 knows that baiting is going on during the split, which is --
22 he goes out there to look on the 27th where there is bait in
23 the water, and the split is between December 1st and the
24 19th, somewhere around that area. This is a long period of
25 time here where anybody having contact with the water sees

1 the bait. And, again, as Howlett says, it's clear to the
2 naked eye the area is baited.

3 So based upon all of the evidence provided by the
4 investigation by Officer Howlett and the statements of
5 Mr. Childers, absolutely inconceivable that he did not know
6 or should not have known, because he had knowledge of the
7 area, he's an experienced hunting, he's been heard hunting
8 migratory game birds. In 43 years he is well aware of what
9 the law is or should be. It's inconceivable that he did
10 not, should not have known of the possibility of it being
11 baited, and what that means is that he had obligation to
12 check the area.

13 THE COURT: What about this argument of the 10-day
14 period?

15 MS. STERLING: The 10-day period means there was
16 never a period in time -- there was never a 10-day period
17 where we didn't find bait. If you found bait on the 23rd
18 and the 26th of December, the ten-day period wouldn't start
19 to run until the bait was removed.

20 The bait was never removed. In fact, Officer
21 Howlett said it looked like there was more bait in January.
22 So even if Mr. Childers thought, oh, it was back in
23 December, the fact that he knew that there was baiting in
24 the past created an obligation on his part to check and not
25 just check on the day of. He should have checked before

1 because it's not just he could not have just shown up on the
2 date in question, the 19th of January and said doesn't look
3 like bait. He would have had to have gone prior to that,
4 ten days prior to that to see if it had been removed.

5 And if he came back -- and after he went down and
6 saw that it had been removed, if he looked around, there was
7 no bait, he would still have to wait ten days. He would
8 have to wait ten days because, as Officer Mena said, the
9 ducks are -- have a reflective tendency to return to the
10 area even when the bait is gone.

11 It's not a long period of time, and it's
12 inconceivable that he did not know or should have not known.
13 He should have known that the possibility of bait was there,
14 and it was his duty as a hunter to check that out. We don't
15 know where he came -- whether he came between the 27th and
16 January the 19th, but we do know that the area was clearly
17 baited, and you can see from the government's evidence, very
18 unlikely that the bait seen so regularly during this period
19 had ever been removed, much less having been removed ten
20 days before January the 19th.

21 So, again, Your Honor, we would ask the Court to
22 find that the evidence is, in the government's opinion,
23 overwhelming. I would note just as a historical point that
24 the baiting law was changed about 1998 because the statute
25 used to be strict liability. There are a number of courts

1 that had a problem with that, including the Fifth and the
2 Fourth Circuit. It was eventually changed, and it was
3 changed because the courts felt that there should be some
4 scienter. It's not -- there should be some obligation on
5 the part of the -- some knowledge on the part of the hunter.
6 And that is why it is now drafted the way that it is, that
7 the hunter either has to know or reasonably should have
8 known.

9 An experienced hunter as Mr. Childers should have
10 known. That knowledge should have prompted him to do an
11 inspection. His failure to do so at the date on the date in
12 question on the 19th of January and times prior to that, and
13 because, clearly, the last time we know it was done was
14 December 27th. It was clearly baited on that date.

15 His failure to inspect means that he has violated
16 the baiting law, as Officer Mena has testified. The law is
17 there to make hunting a sport, to protect the birds. It's
18 very important, it's very necessary, and Mr. Childers is
19 clearly in violation, and we would ask the Court to find him
20 so.

21 THE COURT: Thank you, Ms. Sterling.

22 Mr. Roberts, I'd be happy to hear from you.

23 MR. ROBERTS: I want to thank you for your patience
24 because, candidly, and apologize, if you're not a duck
25 hunter, this has been one of the most boring hearings I've

1 ever --

2 THE COURT: I find it interesting.

3 MR. ROBERTS: Well, I'm glad, Judge. I'm glad.

4 THE COURT: I learned a lot today.

5 MR. ROBERTS: Well, I'll tell you, I've been doing
6 this for 40 some years. There is still a lot I don't know,
7 and I respect everything these gentlemen have done, and I've
8 told them that.

9 As you know, it's quite obvious they've got the
10 burden of proof. We have rested, and so now we are at a
11 standard of whether they presented the evidence to prove the
12 case beyond a reasonable doubt. Throughout her summary
13 Ms. Sterling talked about what they know, but I think the
14 evidence pointed out all of the things that they don't know,
15 Judge.

16 I would say, in trying to summarize my thoughts
17 without going over the evidence ad nauseam, which I hope I
18 have not done, this is either a case where my client baited
19 it, baited this area of the creek, and best he's aware,
20 there is no evidence of that.

21 THE COURT: There is no evidence of that.

22 MR. ROBERTS: All right. It's then the other
23 option is that he did not bait it but that he was aware on
24 the 19th of January.

25 THE COURT: Or the evidence requires prove that he

1 reasonably should have known on that date.

2 MR. ROBERTS: Now, that's the next scenario.

3 THE COURT: All right.

4 MR. ROBERTS: I don't think they've proven that,
5 either, that he was aware. The only thing they have, Judge,
6 is the statement made to Officer Howlett and Officer Mena.
7 Their proof can rise no higher than their own evidence.
8 Officer Mena correctly stated that his statement was that he
9 knew it was somewhere on Gordon Creek.

10 Remember this, please, that at the beginning of the
11 case when Officer Howlett testified, the length of this
12 creek, this tidal creek from the Chickahominy River to the
13 dam at Jolly Pond is somewhere between 5 and 10 miles of
14 tidal flow back and forth, back and forth.

15 So what was --

16 THE COURT: Don't you have a problem with that,
17 though, given the fact that he was there on the 27th? I
18 mean --

19 MR. ROBERTS: Well, I was going to talk about that.

20 THE COURT: Yeah. I mean, conceivably it's true,
21 Gordon Creek is quite lengthy, and --

22 MR. ROBERTS: Well, look at the map, Judge.

23 THE COURT: It could be, you know, that it was
24 baited anywhere in that 5 to 10-mile stretch, but the
25 evidence before the Court suggests that on the 26th, when

1 Officer Howlett was there, that he saw bait, and that the
2 following day Mr. Childers was there, and very likely would
3 have seen bait that same day.

4 MR. ROBERTS: Very likely but not proof beyond a
5 reasonable doubt because all Officer Howlett could say from
6 his game cams -- because he wasn't there -- was that he saw
7 Mr. Childers go down a path.

8 THE COURT: Walking in that direction.

9 MR. ROBERTS: He didn't say how far he got down to
10 the path, didn't say -- there was a camera on the creek as
11 well. There is no evidence that the camera on the creek --
12 remember, those two cameras, one showing the road that goes
13 down to the creek and one showing the area of the creek.
14 There is no evidence that the second camera, the creek
15 camera showed that Mr. Childers was down there looking
16 around and sniffing around.

17 THE COURT: Yes, but the -- I understand, and I
18 appreciate your argument on that, and I don't disagree with
19 you there, but the question is, you know, it requires the
20 Court to sort of suspend disbelief to believe that he would
21 have gone through this cul-de-sac, parked in this lot, and
22 then walked towards the creek, you know, without the purpose
23 of going to the creek.

24 MR. ROBERTS: Well, I would just say --

25 THE COURT: It requires me to suspend disbelief

1 that he would go there and then be found in that same place
2 hunting without, at a minimum, as you've suggested, or at
3 least argued, and this question of scouting.

4 MR. ROBERTS: Right.

5 THE COURT: Was he scouting there?

6 MR. ROBERTS: That's the point I was going to make
7 because you don't go down to where the ducks are, where the
8 bait is, if you're scouting. As a matter of fact, you want
9 to be as quiet and as unobtrusive and as invisible as you
10 can be to anything near the surface of the creek.

11 So, I mean, it's just as likely -- Ms. Sterling
12 said it's inconceivable he didn't know the bait was there on
13 the 27th. It is conceivable. But whether it requires
14 suspension of disbelief by the Court, I'll leave to you,
15 Judge.

16 THE COURT: All right.

17 MR. ROBERTS: The final scenario is, or the next,
18 is that he didn't bait but he should have been aware. And I
19 would agree with the government's position, but for the
20 distance in time from the 27th of December to the 19th of
21 January, I would agree. Because if this is a pond or a
22 stagnant river or a field that's flooded either
23 intentionally or by rain, that bait is not going anywhere.
24 It's not going anywhere unless the ducks eat it all up. And
25 we haven't heard the numbers of ducks and geese and water

1 fowl that you would expect to consume all the bait in that
2 period of time. Couple dozen mallards and some geese.

3 And it's just as conceivable, and conceivable -- I
4 think it's conceivable this roost area, a hunter sees some
5 ducks, he thinks I'll come back here. That's what we do.
6 It's not a mine we're ready to hunt. Well, let me ask you
7 this, Judge.

8 You're in a subdivision on the shore. You think
9 you may be in the subdivision or on the adjoining property.
10 You're going to go down there banging away at ducks with
11 neighbors and construction people and prospective buyers of
12 the watch. You're going to go down there banging away at
13 ducks over bait where any one of them could pick up -- well,
14 I don't have it, but, you know, could pick up something and
15 go, 911, there's somebody firing away down here.

16 No, that's not conceivable. At any rate, somewhere
17 it was baited; we don't know where. Someone baited it; we
18 don't know who. The date of the 19th is what's important.
19 That's 23 days after the 27th. 23 days after the 27th he
20 comes in by boat. It's dark. Officer Howlett said it
21 was -- he set up at 5:45. Sunrise that day was at about
22 7:20, I think the evidence showed. It's dark. It's
23 wintertime. And there is no evidence that there are
24 statements by the defendant out of the presence of the
25 officers, hey, boys, look at this, look at all this bait,

1 or, wow, we are really in for it.

2 The other evidence that they have to support this
3 is a baited hunter, no decoys. I mean, we have already
4 explored that, I hope. But you don't need decoys to duck
5 hunt if it's a roost or a certain type of area. There is
6 also evidence that Mr. Hitchens, the neighbor, feeds and
7 baits the ducks. Look at the map. It's not far from where
8 my client was.

9 As a matter of fact, there is evidence he thought
10 he was on Hitchens property. And in terms of removal of the
11 bait between the 27th and the 19th, Officer Mena summed it
12 up for us, I think, rather well. Either the water fowl will
13 eat it, somebody goes in there and cleans it up, not bloody
14 likely. The tide washes it away. It sinks into the mud.
15 You see the picture of the marsh, how muddy it is there.
16 And it disappears, or the wind blows it one way or the other
17 where it's trapped and out of sight.

18 My position here is, Judge, and I'm not stretching
19 credulity of the Court, that he didn't bait it. He didn't
20 know it was baited on the date that he come in. And he had
21 no reason to believe it would be baited that long after he
22 was there on the 27th. It was dark, and wind -- the most
23 damning evidence, I think they have, is that photograph --
24 and the Court questioned Officer Howlett -- was the bait in
25 the boat or was it in the water? He's in the boat. He said

1 there was bait all around. It's in the water. And he did
2 not return to that boat, from the testimony of Officer
3 Howlett, from the time he parked it or hid it over by those
4 trees, until the time he was questioned by Officer Howlett.
5 So how would he see what is, I think, a pretty damning
6 picture, all that Milo, those little grains all over -- how
7 would he see that?

8 They point out that he's been a duck hunter for 43
9 years. He's going to take two kids, his son, to a place
10 where he's either baited, and I don't think we believe that,
11 or he knows they're bait, and yet he abides by every other
12 rule and law which are voluminous to be a duck hunter,
13 Judge.

14 You heard about all the checks that they did. No
15 violations there. Does that indicate someone who would be
16 lawless enough to take their kids and a stranger, or another
17 kid, out there and stand in the bait? I don't think they
18 have proven it, Judge.

19 THE COURT: Thank you, Mr. Roberts.

20 Anything further, Ms. Sterling?

21 MS. STERLING: I will be brief. Your Honor,
22 obviously, the Court knows it's not the burden of the
23 government to disprove every conceivable hypothesis of
24 innocence in this case. Mr. Roberts has offered all sorts
25 of alternative explanations for what happened.

1 The government would submit that those are not
2 based on facts, and what has been concluded from all facts
3 is that the defendant is guilty. He does live in Seaford.
4 That is 30 minutes away. He's not -- he's not coming here
5 because it's convenient to him. But hunting, as far as
6 everybody in the neighborhood hearing, this hunting is going
7 on early in the morning before anybody would be expected to
8 show up to work in the area.

9 Clearly, the Milo's everywhere, he should have seen
10 it. It was everywhere on the 19th, it was everywhere on the
11 18th. If it was too dark on the morning of the 19th, and he
12 was going before sunrise, he should have gone the day
13 before. And Officer Howlett was there the day before, and
14 he will tell you that the bait was everywhere. So we would
15 ask for you to find him guilty.

16 THE COURT: All right. Thank you.

17 Thank you, counsel. You may be seated. I do find
18 it's an interesting case, and it's interesting how the law
19 has been constructed to deal with the issue and the
20 protection of migratory birds.

21 The statute requires, and the regulation requires,
22 that the defendant be shown to have taken any migratory
23 bird, or attempted to do so, and then he acted unlawfully in
24 doing so.

25 Unlawfully in this context requires proof beyond a

1 reasonable doubt that he took the bird and that he did so by
2 aid of baiting or on or over any baited area provided with
3 respect to that second proviso that he knew or reasonably
4 should have known that the area was baited. The attorneys
5 have been arguing about that. They understand that. There
6 is no dispute here that he took a migratory bird and/or
7 attempted to do so. The birds are shown in Exhibit 8, and
8 he admitted that he shot one of those two drake mallards.

9 The question is did he do so knowingly or
10 reasonably should have known that he was hunting over an
11 area that had been baited. There is no dispute the area --
12 that there was bait in the area on January 19th while
13 Officer Howlett testified to that.

14 So the question is, you know, did the defendant
15 know or should he reasonably have known about the bait in
16 that area. I find that the evidence does establish by proof
17 beyond a reasonable doubt that he either knew and/or
18 reasonably should have known that there was bait in the area
19 that he was hunting in on that date.

20 I would note that this area as shown in the
21 photographs, the baiting is not something that is hard to
22 notice. It looks like the area was substantially baited,
23 and particularly this photo Government's Exhibit 3 showing
24 the log, this isn't the kind of wash that would move up and
25 down a tidal creek in these kind of volumes and just land on

1 top of this log. If, in fact, you can see it on the creek
2 bed itself, but you just see incredible amounts of the bait
3 on the log as shown in this.

4 It's also shown clearly on the bed in Government's
5 Exhibit 2, as well, and Government's Exhibit 5. But
6 relative to the 19th, that Government's Exhibit 3 was taken
7 the day before, and it shows that there was substantial
8 baiting. This isn't adjacent -- immediately adjacent to
9 areas in which bait would have washed off agricultural
10 fields or even if, and I see no reason not to accept the
11 evidence suggesting that Mr. Hitchens may have fed ducks.

12 The map shows that his property is -- that seed
13 would have to travel a significant distance to get to the
14 area in which the hunting occurred, and particularly in the
15 volumes that the seed was found and shown, I don't accept
16 that this was simply a bait that arrived there by some other
17 reason.

18 The area was baited deliberately to attract ducks.
19 Significantly, the defendant and his son were in that area
20 on December 27th. It's an area that is not closest to their
21 home. It is 30 minutes away. It is apparently an area --
22 generally, Gordon Creek is an area that the evidence shows
23 the defendant is familiar with by virtue of his membership
24 in a hunt club.

25 But to get to this particular area, he had to enter

1 a subdivision that has a no trespassing sign, go past that,
2 go to a cul-de-sac, and then drive from that cul-de-sac to
3 apparently a parking lot that's removed from the cul-de-sac
4 and then walk through -- from that parking lot area to the
5 creek area to, if not exam the creek itself, to scout the
6 hunting location. We don't have to debate whether or not he
7 actually went down to the creek bed on the 27th or not
8 because the defendant himself said he knew that area
9 generally was being baited by someone.

10 The evidence that's before the Court suggests that
11 perhaps the story may have -- the testimony that or the
12 statements he made to officers may have changed a little bit
13 because when he's stopped on the 19th, his testimony --
14 and I'll review it more in detail -- was that he knew that
15 that area had been baited. He said a person who -- he was
16 aware that a person had put bait but that person was not
17 hunting with them. He knew there was bait there, and since
18 he did not put it out, he thought it was okay to hunt.
19 That's different than suggesting that, I thought someplace
20 else on the creek was baited or generally some other area of
21 Gordon Creek, which is 5 to 10 miles long, was baited as
22 perhaps would suggest that later on February 5th.

23 So when he's confronted at the scene, he says, yes,
24 this area has been baited by someone else. I'm not going to
25 give you that person's name. But I knew that there had been

1 bait there. And he didn't state I thought it was gone or I
2 thought I waited long enough to be outside of the 10-day
3 period post removal. He said since I didn't put it out
4 there, I thought it was okay to hunt, words to that effect.
5 I'm not quoting him verbatim but that is the import of the
6 testimony.

7 So I think that is very significant relative to my
8 finding of guilt in this case. I'd also note, when he's
9 there on the 19th, it followed Officer Howlett's visit to
10 the site on the 18th in which he had indicated that the bait
11 appeared to be heavier and had been replenished, and as
12 indicated by that photo of the log which shows substantial
13 amounts of bait being placed in the area, presumably, to
14 attract ducks.

15 Now, on the 19th, there is no claim that the
16 defendant was jump shooting on that date, trying to sneak up
17 on the ducks quietly. The motor was running, and the ducks
18 apparently jumped up in advance or upon hearing the motor.
19 They weren't pedaling into place. I think it is significant
20 that no decoys were placed on that particular morning in
21 question.

22 I'd also find it significant that when the
23 defendant is visited soon after this incident, there
24 officers observed in plain view some -- it looks like
25 multiple bags of shelled corn in a van to which the

1 defendant had access in which he and/or his wife drove that
2 was on the property. The shelled corn bags are visible.
3 They are ripped open, and apparently there were more than
4 just a couple in the car.

5 The defendant's statement to the officers is also
6 significant to the Court, as well, on that date. So I think
7 the evidence is sufficient to show that he both did know
8 that the area -- that he was hunting over a bait area as
9 well as that he reasonably should have known that he was
10 hunting over a baited area on the 19th of January.

11 That's also made clear by what he says about the
12 boys, because he also told them that the boys had no
13 knowledge of the bait being in the area, which, again, is
14 suggested that he, in fact, himself knew that the bait was
15 in that area in which they were hunting that morning.

16 So I find the defendant guilty. I find that the
17 government has met its burden of proof. So that brings us,
18 then, to the sentencing phase of the case.

19 Ms. Sterling, do you desire to present any
20 evidence?

21 MS. STERLING: No, Your Honor.

22 THE COURT: Mr. Roberts, do you desire to present
23 any evidence?

24 MR. ROBERTS: If I may, without objection, I would
25 just proffer about his employment.

1 THE COURT: Absolutely. Come to the podium.

2 MS. STERLING: No objection.

3 MR. ROBERTS: If it please the Court,
4 Mr. Childers --

5 THE COURT: Before you do that, let me also say the
6 Court, in making its findings, considers the defendant's
7 extensive knowledge of hunting and his history of hunting in
8 making its findings today. It isn't as if he was a neophyte
9 who was out duck hunting for the first time. He's someone
10 who is an experienced hunter, and, as you indicated, took
11 other steps to comply with the law but did not meet his
12 obligation with respect to the finding I've already made.

13 I'd be happy to hear you.

14 MR. ROBERTS: Judge, thank you. And thank you for
15 explaining your ruling and going into detail. I appreciate
16 that.

17 Mr. Childers is self-employed. The dump truck you
18 heard about is his dump truck. He has a hauling business.
19 He's actually done work in this subdivision and others. And
20 he lives there in Seaford with his wife. He has a son that
21 was with him that day.

22 On the date in question Officer Howlett seized his
23 gun, all three guns. The humiliation, embarrassment, and
24 expense that he's gone through in regard to this, hard to
25 understand all that, but -- and there are pending trespass

1 to hunt charges in state court as well.

2 THE COURT: All right. Thank you. Then I'll be
3 happy to hear argument from the government, then we will
4 hear any argument from Mr. Roberts, and if Mr. Childers
5 wishes to say anything, I'll hear from him as well.

6 MS. STERLING: Your Honor, Mr. Childers has been
7 hunting for over 40 years, and in that period of time he
8 is -- he's not a neophyte to hunting. He is also not a
9 neophyte to hunting over bait. He was convicted -- I'm
10 sorry, he was charged in 2003 by violation notice both with
11 baiting and hunting over bait. It was his -- he was given
12 the opportunity to pay. He did pay the forfeiture of
13 collateral, and so he does have those two convictions in
14 199 --

15 THE COURT: You say two? Is it one or two
16 convictions?

17 MS. STERLING: Two separate offenses.

18 THE COURT: In 2003?

19 MS. STERLING: 2003. One for placement of bait,
20 and one is for taking migratory birds by aid of bait. So
21 two charges, same incident, Your Honor.

22 THE COURT: Very well. It's the same date offense?

23 MS. STERLING: Same date offense was December 17th
24 of 2003.

25 THE COURT: Thank you.

1 MS. STERLING: In 1996 he was convicted of -- or
2 he -- I'm not sure. He may have paid the fine. But he was
3 charged with possessing a white shot while hunting migratory
4 game birds. He was found guilty, he paid a fine, is what
5 that indicates.

6 He's also, way back in 1995, before the law
7 changed, he was charged with hunting by aid of bait. He was
8 found not guilty by Judge Bradberry. I mention that only to
9 point out, he's familiar with the judicial process on these
10 cases, as well. 1995 would have been before the law
11 changed, and it's not -- he was not convicted. But I point
12 that out to say he's -- he knows what's going on and how
13 this works. Because of this, the government is particularly
14 concerned.

15 We would ask in this case that there be a fine. I
16 think the collateral amount was a little over \$1,000. We
17 would ask for -- because --

18 THE COURT: Is it 1,000? I thought it was 500.

19 MS. STERLING: I'm sorry. You're right. It's 500
20 for each, and we don't think that is sufficient. He paid --
21 what I meant to say, Your Honor, he meant -- the last -- in
22 2003 he paid a total of \$1,035. That did not deter him. We
23 would ask for a fine of \$2,400, because this is a second
24 offense, and I want to emphasize to the Court our concern
25 about this being a second offense.

1 As the Court is well aware, hunting -- there is not
2 a lot of enforcement out there because we don't have enough
3 officers to watch after things, and so it's important that
4 when people are found to violate the law, the baiting deter,
5 but also that there be a matter of general deterrence. Many
6 other people out there that know that when you hunt if you
7 are hunting over bait, you are going to pay a severe
8 penalty, and in that way, hopefully, people will be
9 deterred.

10 In addition to the fine, we would also ask that his
11 hunting privileges be suspended for a period of two years,
12 and that would include his not being allowed to hunt
13 anywhere in the world. There was testimony that he does go
14 to Canada to hunt. In addition to his not hunting --

15 THE COURT: Are you asking that he be placed on
16 probation for that period of time?

17 MS. STERLING: We would ask for unsupervised
18 probation as a condition of that primarily because I don't
19 know that reporting to the probation officer is the thing
20 that we are concerned about or that furthers justice in any
21 way, but we don't want him hunting.

22 We don't want him to assist anyone hunting or be in
23 the presence of anyone hunting, and we don't want him to be
24 able to apply for or obtain a permit or any other
25 documentation that would allow him to hunt for a period of

1 24 months. And that is, Your Honor, because this is a
2 second offense. I can't remember the last time I tried a
3 bait case in this court, but we did have recently another
4 case where someone pled guilty. It was their first federal
5 bait conviction, and we asked for a one-year suspension. We
6 are asking for the two years because this is his second.

7 THE COURT: Thank you, Ms. Sterling.

8 MS. STERLING: Thank you.

9 THE COURT: Is there a processing fee that goes
10 with this case?

11 MS. STERLING: It's, yes, a \$10 special assessment
12 and a \$30 processing fee, Your Honor.

13 THE COURT: All right. Thank you.

14 Mr. Roberts, I'll be happy to hear from you.

15 MR. ROBERTS: The Court's made its decision. It's
16 heard a lot of things about that day and the couple of weeks
17 before. I'm not arguing about unsupervised probation. I
18 think that's fair in this case. The fine --

19 THE COURT: You mean you don't want him supervised?

20 MR. ROBERTS: I think that that would probably be
21 in the best interest of everyone. I think it's a waste of
22 assets to supervise in this case. I hope you agree. I
23 think the fine should be higher, and I've said that to
24 Ms. Sterling. I'm a water fowl hunter. I think the fine
25 should be higher. I told him that.

1 As for the hunting rights suspended, two years is a
2 long time for someone who has had the experience he has.
3 Granted, it is a second offense, but that was 16 years ago,
4 Judge. He was a lot younger in them days, as we say. I
5 remind you of what I think the humiliation and the
6 punishment must be to a man who has his son out there. I
7 guess that's a double-edged sword.

8 Why would you take him out there, you're
9 responsible, but you've made your findings. I would suggest
10 he's been punished already and will continue to be punished
11 as the state case proceeds, if the evidence there is
12 sufficient.

13 If you're going to consider suspending it, and I
14 suspect you are, I would ask for a year of suspension. I
15 think that's sufficient, if it please the Court.

16 THE COURT: All right. Thank you. Mr. Childers.

17 MS. STERLING: Your Honor, if I -- I'm sorry, may
18 I?

19 THE COURT: Yes.

20 MS. STERLING: Your Honor, if the Court thinks that
21 24 months is too long, we would ask for at least 14. That
22 would cover the entire hunting season. It would be an
23 entire year of hunting. The hunting season would end at
24 approximately January 19th or 20th. So if it were to be a
25 year from this date, he would still be hunting in the next

1 hunting season, and we don't want that. We would ask for a
2 minimum of 14 months suspension, Your Honor.

3 THE COURT: All right. Thank you.

4 Mr. Childers, if you will come to the podium with
5 your attorney. You have an opportunity to address the Court
6 before sentence is imposed. Is there anything you would
7 like to say here today, sir?

8 THE DEFENDANT: No, sir.

9 THE COURT: All right. Mr. Childers, certainly,
10 it's, as someone who -- I don't duck hunt but I do fish, and
11 I do enjoy getting out in the wild and nature, and
12 apparently you do as well. You have a long history of that.

13 It's disappointing to the Court that you've been
14 down this road before, and you're back here again having
15 been charged. I'm not considering the charge for which you
16 were found not guilty in selecting a sentence, but having
17 been charged, having been charged with possessing a lead
18 shot, and then charged with hunting over bait and placing
19 bait in conjunction with hunting, admittedly, it has been a
20 while. I will factor that in to the sentence, at least in
21 terms of any convictions, and there's no other evidence that
22 you've done this between 2003 and 2019 so I'm not going to
23 consider that.

24 But you shouldn't be here. You should have learned
25 your lesson from this before, and it appears to the Court

1 that you haven't. You're well past the age of which your
2 judgment should be formed about these things, and I'd like
3 to hope and think that you would have been, you know,
4 humiliated and embarrassed that this happened in front of
5 your son. I know nothing about you one way or the other.

6 I don't know. I think sometimes people feel like
7 it's a game of cat and mouse with these conservation
8 officers, and, you know, they're perfectly happy when they
9 don't get caught, and they blame the conservation officers
10 when they do get caught, and they're not happy about that.
11 So I don't know how you feel about this. You haven't told
12 me. That is your right not to tell me, so I make no
13 judgments about that.

14 But I would hope that what Mr. Roberts says is
15 true, that you want your children to be responsible hunters
16 and people who take wildlife responsibly and enjoy the
17 outdoors and do that. Obviously, this isn't the right way
18 to go about teaching and imparting that lesson so that the
19 ducks will be around when your son is your age and when your
20 son wants to take his son duck hunting, that they will be
21 there.

22 That's really what this is about. That is what
23 these laws are designed to protect, because I read a book
24 recently dealing with how the migratory bird treaties came
25 to be in effect. It went through this history of talking

1 about fly tires. Obviously, a real art to get these very
2 unique feathers, to tie flies that are incredibly unique and
3 involve feathers from very, very rare birds from all over
4 the world.

5 And what happened was that people were taking these
6 birds to get these feathers in part for fly tying but mostly
7 for clothing, that women wore these elaborate hats and
8 clothing with feathers, and they are apparently quite
9 beautiful, but they were killing off all the migratory birds
10 and these very rare birds, and it led to these treaties.

11 So the idea is that we want to preserve these
12 resources so the future generations can enjoy their beauty,
13 or whether they want to just watch the ducks swim or fly or
14 whether they want to hunt them and eat them because they
15 enjoy being outdoors and doing those things.

16 So you know that this is wrong. I don't need to
17 tell you that. It will be the sentence of the Court that
18 you are ordered to pay, having taken into account the
19 sentencing factors and the facts presented here today, a
20 special assessment of \$30 -- I'm sorry, a processing fee of
21 \$30, a \$10 special assessment.

22 I am going to impose a fine of \$1,200. I am going
23 to place you on a term of probation for 14 months. That
24 probation will be unsupervised but that doesn't mean that,
25 you know, conservation officers might be checking whether or

1 not you've gotten a license to go hunting or gotten the
2 stamps, and so forth, that you need to do that. It will be
3 conditions of probation that you are required to perform 75
4 hours of community service. I guess by imposing that, is
5 that going to create an issue with supervision?

6 MS. STERLING: Well, we have to have some mechanism
7 where it would be reported. I don't mind if Mr. Roberts
8 takes care of that and provides it to me and I provide it to
9 the Court.

10 MR. ROBERTS: I will be on his case, Judge, about
11 that. I can even suggest some community service sites for
12 him.

13 THE COURT: All right. So the idea of that is
14 that, you know, that's in lieu of jail time. The idea is
15 that we have to find other ways to, perhaps, get you the
16 message that you're not going to continue to do this in
17 spite of the history that you have.

18 So I'm going to direct that you perform 75 hours of
19 community service, that you notify your attorney, and that
20 he notify the United States Attorney if there is an issue
21 with that. Then I'll ask the U.S. Attorney to bring that to
22 the Court's attention prior to the termination of the
23 14-month period of unsupervised probation.

24 Your hunting privileges will be suspended during
25 that time period. You're not to hunt anywhere in the world

1 during that time period. And you, of course, are not to
2 apply for any license or permit or stamps to engage in
3 hunting during that time period as well.

4 MS. STERLING: I'm sorry, Your Honor. We also ask
5 that he not assist or be present with others who are
6 hunting. We don't want him to be in a situation where he's
7 out in a blind, you know, saying that he's not hunting. We
8 don't want him to engage in anything related to hunting.

9 THE COURT: Right. So it will be a condition that
10 you are not to be present around others who are engaged in
11 hunting, as well, during that 14-month period. The idea is
12 that you're going to have to take a break from this either
13 directly yourself or engaging in it vicariously being around
14 others who are doing that as well.

15 MR. ROBERTS: May I inquire, Judge?

16 THE COURT: Yes.

17 MR. ROBERTS: Can we define that as the act of
18 hunting because if you're -- I mean, what is hunting? If
19 you're at the hunt club for a Thanksgiving dinner that they
20 are having or, you know --

21 THE COURT: That doesn't sound like hunting to me.

22 MR. ROBERTS: Well, I don't want anybody to mistake
23 what we are talking about. I think the act of hunting would
24 fine tune it, if I may suggest.

25 THE COURT: I guess the question is, if you're

1 sitting in a blind, you know, and you're waiting four hours
2 for some ducks to land in the field or on the water, you
3 know, you're not actually hunting -- I don't know what the
4 act of hunting is, then, you know.

5 MS. STERLING: That's why I said that he can't
6 assist anyone with hunting or be present when others are
7 hunting, present when they are hunting; not at a festival or
8 not at a dinner kind of social occasion.

9 MR. ROBERTS: I guess we will just have to --

10 THE COURT: I will ask the clerk to make the
11 condition in the form that Ms. Sterling said, not to assist
12 others and not to be present when others are hunting.

13 MS. STERLING: When others are hunting.

14 MR. ROBERTS: Thank you, Your Honor.

15 THE COURT: I think it's reasonably clear as to
16 what that requires.

17 Is there anything further we need do in
18 Mr. Childers' case today?

19 MS. STERLING: No, Your Honor. Thank you.

20 MR. ROBERTS: No, sir.

21 THE COURT: Mr. Roberts, thank you.

22 MR. ROBERTS: Yes, sir.

23 THE COURT: Ms. Sterling, thank you.

24 MS. STERLING: Thank you.

25 THE COURT: Mr. Childers, good luck to you. You

1 are going to receive some paperwork about these penalties,
2 and I expect you to pay them promptly, and if you don't,
3 obviously, that could constitute a violation of probation
4 about which you would not want to have to come back to
5 Court. Do you understand that, sir?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: Very good. If there is nothing
8 further, then the Court will be in recess.

9 MS. STERLING: Thank you.

10 (Hearing adjourned at 1:31 p.m.)

11 CERTIFICATION

12
13 I certify that the foregoing is a correct
14 transcript, to the best of my ability, of the court's audio
15 recording of proceedings in the above-entitled matter.

16
17 X _____/s/ _____x

18 Jody A. Stewart

19 X _____1-6-2020 _____x

20 Date